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10 UNITED STATES OF AMERICA
11 NATIONAL LABOR RELATIONS BOARD
12 REGION 21

13 COASTAL MARINE SERVICES, INC.,

Case No.: 21-CA-139031

14 Respondent,

15 And

**BRIEF OF CHARGING PARTY IN
SUPPORT OF EXCEPTIONS**

16 INTERNATIONAL ASSOCIATION OF
17 HEAT & FROST INSULATORS AND
18 ALLIED WORKERS, LOCAL 5,

Charging Party.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THE FUAP IS GOVERNED BY THE BOARD’S DECISION IN <i>MURPHY OIL</i>	1
III. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT, NO TRANSACTION AND NO CONTROVERSY.....	1
IV. THE BOARD MUST USE THIS CASE TO ADDRESS THE CONSTITUTIONAL ISSUE OF WHETHER THE FAA CAN BE APPLIED TO ACTIVITY WHICH DOES NOT AFFECT COMMERCE	3
A. INTRODUCTION.....	3
B. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT INVOLVING INTERSTATE COMMERCE	5
C. THIS CASE IS BEYOND THE CONSTITUTIONAL REACH OF THE FAA SINCE THERE IS NO SHOWING THAT THE DISPUTES COVERED BY THE FUAP AFFECT INTERSTATE COMMERCE OR THAT THE ACTIVITY OF RESOLVING THOSE DISPUTES AFFECTS INTERSTATE COMMERCE.....	12
D. THERE IS NO “CONTROVERSY” SUBJECT TO THE FAA	16
E. THE RESPONDENT’S ANALYSIS, IF ANY, SHOULD BE REJECTED	17
F. SUMMARY	17
V. THE APPLICATION OF THE FEDERAL ARBITRATION ACT CANNOT OVERRIDE THE IMPORTANT PURPOSES OF OTHER FEDERAL STATUTES THAT ALLOW EMPLOYEES TO SEEK RELIEF FROM THE FEDERAL GOVERNMENT FOR THE BENEFIT OF THEMSELVES AND OTHER WORKERS	18
VI. THE CHECK THE BOX OPT-OUT PROVISION.....	21
VII. THE ATTEMPT TO FORCLOSE COURT REVIEW RENDERS THE FUAP UNLAWFUL	22
VIII. THE FUAP WOULD PROHIBIT COLLECTIVE ACTIONS THAT ARE NOT PREEMPTED BY FAA UNDER STATE LAW.....	22

TABLE OF CONTENTS (cont'd)

	<u>Page</u>
IX. THE FUAP UNLAWFULLY PROHIBITS GROUP CLAIMS THAT ARE NOT CLASS ACTIONS, REPRESENTATIVE ACTIONS, COLLECTIVE ACTIONS OR OTHER PROCEDURAL DEVICES AVAILABLE IN COURT OR OTHER FORA	24
X. THE FUAP IS INVALID AND INTERFERES WITH SECTION 7 RIGHTS TO RESOLVE DISPUTES BY CONCERTED ACTIVITY OF BOYCOTTS, BANNERS, STRIKES, WALKOUTS AND OTHER ACTIVITIES	25
XI. THE FUAP UNLAWFULLY PROHIBITS JOINT ACTION.....	26
XII. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT SALTING AND APPLIES AFTER EMPLOYMENT ENDS.....	27
XIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT FORECLOSES GROUP CLAIMS BROUGHT BY A UNION AS A REPRESENTATIVE OF AN EMPLOYEE OR EMPLOYEES	27
XIV. THE FUAP IS UNLAWFUL BECAUSE IT IMPOSES ADDITIONAL COSTS ON EMPLOYEES TO BRING EMPLOYMENT RELATED DISPUTES	28
XV. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT AN EMPLOYEE OF ANOTHER EMPLOYER FROM ASSISTING AN EMPLOYEE OF RESPONDENT OR JOINING WITH AN EMPLOYEE OF RESPONDENT TO BRING A CLAIM.....	29
XVI. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT APPLIES TO PARTIES WHO ARE NOT THE EMPLOYER BUT MAY BE AGENTS OF THE EMPLOYER OR EMPLOYERS OF OTHER EMPLOYEES UNDER THE ACT.....	30
XVII. THE FUAP VIOLATES ERISA	30
XVIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT RESTRICTS THE RIGHT OF WORKERS TO ACT TOGETHER TO DEFEND CLAIMS BY THE EMPLOYER AGAINST THEM.....	31
XIX. THE FUAP IS UNLAWFUL UNDER THE NORRIS-LAGUARDIA ACT	32
XX. THE MAINTENANCE OF RULES PROHIBITING CONCERTED ACTIVITY CONCERNING THE FUAP MAKES IT UNLAWFUL	32

TABLE OF CONTENTS (cont'd)

	<u>Page</u>
1 XXI. THE FUAP IS INVALID BECAUSE IT IS UNCLEAR AS TO WHAT	
2 IT COVERS, AND THEREFORE IT IS OVERBROAD; THE	
3 DECISION IN <i>LUTHERAN HERITAGE VILLAGE-LIVONIA</i>	
4 SHOULD BE OVERRULED; THE BOARD HAS NOW	
EFFECTIVELY OVERRULED <i>LUTHERAN HERITAGE VILLAGE-</i>	
<i>LIVONIA</i> AND SHOULD EXPRESSLY DO SO.....	33
5 A. INTRODUCTION.....	34
6 B. THE BOARD SHOULD DISCARD LUTHERAN HERITAGE	
7 VILLAGE-LIVONIA TO THE TRASH HEAP OF	
DISCREDITED DECISIONS.....	34
8 C. THE BOARD HAS EFFECTIVELY OVERRULED	
9 <i>LUTHERAN HERITAGE VILLAGE-LIVONIA</i> BY APPLYING	
10 THE RULE OF CONSTRUING AMBIGUITIES AGAINST	
THE EMPLOYER.....	38
11 D. CONCLUSION.....	39
12 XXII. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO	
13 THE CORE RELIGIOUS ACTIVITY OF HELPING OTHER	
14 WORKERS, AND THE FAA, NLRA AND NORRIS-LAGUARDIA	
ACT HAVE TO BE APPLIED TO PROTECT THIS RELIGIOUS	
15 RIGHT.....	39
16 XXIII. THE REMEDY.....	47
17 XXIV. THE MATTER SHOULD NOT HAVE BEEN SUBMITTED ON A	
18 STIPULATED RECORD.....	49
19 XXV. CONCLUSION.....	50
20	
21	
22	
23	
24	
25	
26	
27	
28	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>FEDERAL CAESS</u>	
<i>Abdulhaseeb v. Calbone</i> , 600 F.3d 1301 (10th Cir.2010).....	41, 43
<i>Alleluia Cushion Co</i> , 221 NLRB 999 (1975)	18
<i>Allied–Bruce</i> , 513 U.S., 115 S.Ct. 834	2, 5, 9
<i>Ark Las Vegas Rest. Corp.</i> , 343 NLRB 1281 (2004)	34
<i>AT&T Mobility Servs., LLC</i> , 363 NLRB No. 99 (2016)	1
<i>Bernhardt v. Polygraphic Co. of America</i> , 350 U.S. 198 (1956).....	6, 7, 9, 12
<i>Bristol Farms</i> , 363 NLRB No. 45 (2015)	22
<i>Browning-Ferris Indus.</i> , 362 NLRB No. 186 (2015).....	30
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006).....	2
<i>Caesars Entertainment</i> , 362 NLRB No. 190 (2015).....	34
<i>Century Fast Foods, Inc.</i> , 363 NLRB No. 97 (2016)	1, 33
<i>Chappell v. Laboratory Corporation America</i> , 232 F.3d 719 (2000)	31
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	2, 17
<i>Citizens Bank v. Alafabco, Inc.</i> , 539 U.S. 52 (2003).....	8, 9, 11
<i>City of Boerne v. P. F. Flores</i> , 521 U.S. 507 (1997).....	40, 44
<i>City of New York v. Beretta</i> , 524 F.3d 384 (2d Cir. 2008).....	14, 18
<i>Does I Thru XXIII v. Advanced Textile Corp.</i> , 214 F.3d 1058 (9th Cir.2000).....	20, 25
<i>Double D Construction Group, Inc.</i> , 339 NLRB 303 (2003)	38

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
1 <i>E.E.O.C. v. Waffle House,</i> 2 534 U.S. 279 (2002).....	17
3 <i>Eastex v. NLRB,</i> 4 437 U.S. 556 (1978).....	29
5 <i>EEOC v. Abercrombie & Fitch Stores Inc.,</i> 6 135 S.Ct. 2028, 2015 WL 2464053 (2015).....	46
7 <i>EEOC v. Univ. of Detroit,</i> 8 904 F.2d 331 (6th Cir. 1990).....	46
9 <i>Employment Division v. Smith,</i> 10 494 U.S. 872 (1990).....	39, 42
11 <i>Engleson v. Unum Life Insurance Co.,</i> 12 723 F.3d 611 (6th Cir. 2003).....	31
13 <i>Ex parte McCardle,</i> 14 74 U.S. 506 (1868).....	3
15 <i>FAA Concord H, Inc.,</i> 16 363 NLRB No. 136 (2016).....	3
17 <i>First Options v. Kaplan,</i> 18 514 U.S. 938 (1995).....	30
19 <i>Fresh & Easy Neighborhood Market,</i> 20 361 NLRB No. 12 (2014)	18, 39
21 <i>Garrison v. Palmas Del Mar Homeowners Ass'n, Inc.,</i> 22 538 F. Supp. 2d 468 (D.P.R. 2008)	5
23 <i>Gilmer v. Interstate/Johnson Lane Corp.,</i> 24 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).....	2, 10
25 <i>Gonzales v. Raich,</i> 26 545 U.S. 1 (2005)	16
27 <i>Hall Street Associates, LLC v. National, Inc.,</i> 28 552 U.S. 576 (2008).....	22
29 <i>Hobby Lobby Stores, Inc. & the Comm. to Pres. the Religious Right to Organize,</i> 30 20-CA-139745, 2015 WL 5241738 (Sept. 8, 2015).....	12
31 <i>Hoffman Plastic Compounds v. NLRB,</i> 32 535 U.S. 137 (2002).....	18
33 <i>Holt v. Hobbs,</i> 34 135 S.Ct. 853, 2015 WL 232143 (2015).....	41
35 <i>Insurance Corp. v Compagnie des Bauxites,</i> 36 456 U.S. 694 (1982).....	5
37 <i>Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson,</i> 38 102 F.R.D. 457 (N.D. Cal. 1983)	28

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
1 <i>Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock</i> ,	
2 477 U.S. 274 (1986).....	28
3 <i>Kikumura v. Hurley</i> ,	
4 242 F.3d 950 (10th Cir.2001).....	43
5 <i>Lafayette Park Hotel</i> ,	
6 326 NLRB 824 (1998)	34, 38, 39
7 <i>Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell</i> ,	
8 794 F.3d 1151 (10th Cir.).....	42
9 <i>Lutheran Heritage Village-Livonia</i> ,	
10 343 NLRB 646 (2004)	34, 35, 38
11 <i>Mandeville Island Farms, Inc. v. American Crystal Sugar Co.</i> ,	
12 334 U.S. 219, (1948).....	11
13 <i>Maryland v. Wirtz</i> ,	
14 392 U.S. 183 (1968).....	15
15 <i>Meyers Industries, Inc.</i>	
16 281 NLRB 882 (1986)	18
17 <i>Murphy Oil USA, Inc.</i> ,	
18 361 NLRB No. 72 (Oct. 28, 2014)	passim
19 <i>National Federation of Independent Businesses v. Sebelius</i> ,	
20 132 S.Ct. 2566 (2012).....	11, 12, 13, 14
21 <i>NLRB v. City Disposal Sys. Inc.</i> ,	
22 465 U.S. 822 (1984).....	15
23 <i>NLRB v. Jones & Laughlin Steel Corp.</i> ,	
24 301 U.S. 1 (1937)	15
25 <i>Norris/O'Bannon</i> ,	
26 307 NLRB 1236 (1992)	38
27 <i>On Assignment Staffing Services</i> ,	
28 362 NLRB No. 189 (2015).....	22, 26
<i>Pennsylvania Dept. of Public Welfare v. Davenport</i> ,	
495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990).....	2
<i>Perry v. Thomas</i> ,	
482 U.S. 483 (1987).....	13
<i>Professional Janitorial Service</i> ,	
363 NLRB No. 35 (2015)	22, 39
<i>Purple Communications</i> ,	
361 NLRB No. 126 (2014).....	33
<i>Republic Aviation v. NLRB</i> ,	
324 U.S. 793 (1945).....	38

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
1 <i>Sakkab v. Luxottica Retail N. Am., Inc.</i> , 803 F.3d 425 (9th Cir. 2015).....	23
2	
3 <i>Saneii v. Robards</i> , 289 F.Supp.2d 855 (W.D. Ky. 2003).....	8
4 <i>Shearson Hayden Stone, Inc. v. Liang</i> , 493 F. Supp. 104 (N.D. Ill. 1980).....	5
5	
6 <i>Sherbert v. Verner</i> , 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).....	42
7 <i>Siemons Mailing Service</i> , 122 NLRB 81 (1958).....	4
8	
9 <i>Slaughter v. Stewart Enterprises, Inc.</i> , No. C 07-01157MHP, 2007 WL 2255221 (N.D. Cal. Aug. 3, 2007).....	6, 7, 8
10 <i>Snyder v. Federal Insurance Co.</i> , 2009 WL 700708 (S.D. Ohio 2009)	31
11	
12 <i>Soc. Servs. Union, Local 535 v. Santa Clara Cty.</i> , 609 F.2d 944 (9th Cir. 1979).....	28
13 <i>Stampolis v. Provident Auto Leasing Co.</i> , 586 F.Supp.2d 88 (E.D.N.Y. 2008).....	14
14	
15 <i>Steel Co. v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998).....	3
16 <i>Thomas v. Review Bd. of Ind. Emp't Sec. Div.</i> , 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981).....	43
17	
18 <i>Three D, LLC d/b/a Triple Play Sports Bar & Grille</i> , 361 NLRB No. 31 (2014)	36
19 <i>United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.</i> , 517 U.S. 544 (1996).....	28
20	
21 <i>United States v. Circle C Constr.</i> , 697 F.3d 345 (6th Cir. 2012).....	20
22 <i>United States v. Hardman</i> , 297 F.3d 1116 (10th Cir.2002).....	42
23	
24 <i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	15, 16
25 <i>United States v. Menasche</i> , 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615 (1955)	43
26	
27 <i>United States v. Morrison</i> , 529 U.S. 598 (2000).....	13, 14
28 <i>Walmart Wage and Hour Employment Practices Litigation</i> , 737 F. 3d 1262 (9th Cir 2015).....	22

TABLE OF AUTHORITIES (cont'd)

	<u>Page</u>
1 <i>Wisconsin v. Yoder</i> ,	
2 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).....	42
3 <i>Yellowbear v. Lampert</i> ,	
4 741 F.3d 48 (10th Cir.2014).....	41, 43
5 <u>STATE CASES</u>	
6 <i>Bridas v. Int'l Standard Elec. Corp.</i> ,	
7 490 N.Y.S.2d 711 (N.Y. Sup. Ct. 1985)	9
8 <i>Brotherhood of Teamsters v Unemployment Insurance Appeals Board</i> ,	
9 190 Cal. App 3d (1987).....	28
10 <i>Bruner v. Timberlane Manor Ltd. P'ship</i> ,	
11 155 P.3d 16 (Okla. 2006)	8
12 <i>City of Cut Bank v. Tom Patrick Constr., Inc.</i> ,	
13 963 P.2d 1283 (Mont. 1998)	8
14 <i>Gemini Ambulance Servs., Inc.</i> ,	
15 103 S.W.3d 507 (Tex. App. 2003)	6
16 <i>Iskanian v. C.L.S. Transp.</i> ,	
17 59 Cal.4th 348 (2014)	22, 24
18 <i>Matthau v. Superior Court</i> ,	
19 151 Cal.App.4th 593 (2007).....	30
20 <i>Medina Betancourt et al. v. Cruz Azul de P.R.</i> ,	
21 155 D.P.R. 735 (2001)	5
22 <i>Rodriguez v. Testa</i> ,	
23 296 Conn. 1, 993 A.2d 955 (2010)	14
24 <i>Sonic-Calabasas A, Inc. v. Moreno</i> ,	
25 57 Cal.4th 1109 (2013)	23, 34
26 <u>FEDERAL STATUTES</u>	
27 9 U.S.C. § 1	5, 9, 45
28 9 U.S.C. § 2	passim
29 29 U.S.C. § 11	45
30 29 U.S.C. § 101	32
31 29 U.S.C. § 102	32
32 29 U.S.C. § 103	32
33 29 U.S. C. § 113	32
34 29 U.S.C. § 151	15, 45

TABLE OF AUTHORITIES (cont'd)

Page

1		
2	29 U.S.C. § 159	46
3	29 U.S.C. § 175	29
4	29 U.S.C. § 201	19
5	29 U.S.C. § 217	19
6	29 U.S.C. § 1001	19
7	29 U.S.C. § 1132	20
8	29 U.S.C. § 1133	31
9	29 U.S.C. § 1140	30
10	42 U.S. C. § 2000	passim

STATE STATUTES

12	California Business and Professions Code § 17204	23
13	California Labor Code § 98	28, 34
14	California Labor Code § 210	23
15	California Labor Code § 217	23
16	California Labor Code § 218	23
17	California Labor Code § 225	23
18	California Labor Code § 226	47
19	California Labor Code § 245	23
20	California Labor Code § 1101	24
21	California Labor Code § 1102	24
22	California Labor Code § 2699	22

FEDERAL REGULATIONS

24	29 C.F.R. § 2560.503-1	31
----	------------------------------	----

OTHER AUTHORITIES

26	Robert Gorman and Matthew Finkin:	
27	<i>Labor Law Analysis and Advocacy</i> , (JURIS 2013), § 3.2	4
28	Matthew Finkin,	
	<i>The Meaning and Contemporary Vitality of the Norris-LaGuardia Act</i> ,	
	93 Neb L. Rev 1 (2014)	32

1 **I. INTRODUCTION**

2 The Charging Party takes great exception to the Administrative Law Judge's ("ALJ")
3 decision. Although the ALJ was correct that the "Employee Acknowledgment Agreement"
4 (hereinafter called Forced Unilateral Arbitration Procedure or "FUAP") violates the Act, he failed
5 to address a number of issues raised in this case. He failed to find that the FUAP violates the Act
6 on alternative grounds and additional grounds. The remedy is inadequate and incorrect.

7 **II. THE FUAP IS GOVERNED BY THE BOARD'S DECISION IN MURPHY OIL**

8 The Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014),
9 *enforcement denied in relevant part* 808 F. 3d 1013 (5th Cir 2013) governs. See many more
10 recent cases such as *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016) and *AT&T Mobility*
11 *Servs., LLC*, 363 NLRB No. 99 (2016). On this the ALJ was correct.

12 For reasons discussed below, however, there are additional and related reasons why the
13 FUAP is unlawful. We particularly address the application of the Federal Arbitration Act which
14 we assume will be the Respondent's primary argument.¹ All of the issues arise from the
15 allegations of the Complaint and the Answer and anticipated defenses.

16 **III. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT, NO**
17 **TRANSACTION AND NO CONTROVERSY**

18 The ALJ did not address this issue.²

19 Preliminarily the FAA does not regulate the business or commercial activity of the
20 Respondent. **It is limited to arbitration that is it. The fundamental issue is whether for**
21 **application of the FAA and for application of the FAA consistent with the Commerce**
22 **clause, does there have to be proof that arbitration or the dispute subject to that mechanism**
23 **affect commerce?**

24 The FAA applies only where there is "a contract evidencing a transaction involving
25 commerce to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C.

26 _____
27 ¹ Respondent recycled someone else's argument filed in another case with no new arguments or ideas.

28 ² Contrary to the ALJ the Board did not address these FAA constitutional issues in prior cases. It just
assumed the FAA applied. .See ALJD, footnote 3.

1 § 2. Under the FAA, there must be some other “contract ... involving commerce.”

2 The Supreme Court’s seminal decision applying the FAA is expressly conditioned upon
3 the existence of an employment contract:

4 Respondent, at the outset, contends that we need not address the meaning of
5 the § 1 exclusion provision to decide the case in his favor. In his view, an
6 employment contract is not a “contract evidencing a transaction involving
7 interstate commerce” at all, since the word “transaction” in § 2 extends only to
8 commercial contracts. See *Craft*, 177 F.3d, at 1085 (concluding that § 2
9 covers only “commercial deal[s] or merchant’s sale [s]”). This line of
10 reasoning proves too much, for it would make the § 1 exclusion provision
11 superfluous. If all contracts of employment are beyond the scope of the Act
12 under the § 2 coverage provision, the separate exemption for “contracts of
13 employment of seamen, railroad employees, or any other class of workers
14 engaged in ... interstate commerce” would be pointless. See, e.g.,
15 *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562, 110
16 S.Ct. 2126, 109 L.Ed.2d 588 (1990) (“Our cases express a deep reluctance to
interpret a statutory provision so as to render superfluous other provisions in
the same enactment”). The proffered interpretation of “evidencing a
transaction involving commerce,” furthermore, would be inconsistent with
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114
L.Ed.2d 26 (1991), where we held that § 2 required the arbitration of an age
discrimination claim based on an agreement in a securities registration
application, a dispute that did not arise from a “commercial deal or merchant’s
sale.” Nor could respondent’s construction of § 2 be reconciled with the
expansive reading of those words adopted in *Allied-Bruce*, 513 U.S., at 277,
279–280, 115 S.Ct. 834. If, then, *114 there is an argument to be made that
arbitration agreements in employment contracts are not covered by the Act, it
must be premised on the language of the § 1 exclusion provision itself.

17 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-14 (2001); See also *Buckeye Check*
18 *Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (an arbitration provision is severable from
19 the remainder of the contract). See also *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S.
20 265, 277 (1995) (finding “a contract evidencing a transaction involving commerce” as a
21 prerequisite to the application of the FAA).

22 There is no contract. The FUAP creates no contract. The Respondent has offered no
23 evidence that it creates any contract of employment with any employee. The ALJ found none.
24 The FUAP recites “that employment at-will is the sole and entire agreement between myself and
25 the Company concerning the duration of my employment and the circumstances under which my
26 employment may be terminated.” Thus the only alleged agreement is the FUAP, nothing else.

27 Assuming that this is a limited contract on one issue alone, the FUAP effectively
28 disclaims a contract on any other employment issue. Thus the only contract on which the FAA

1 may be applied would be “employment at-will.”³

2 Assuming that the FUAP standing alone is a contract, that contract of employment does
3 not affect commerce. See, *infra*. The FAA applies to “a contract evidencing a transaction
4 involving commerce to settle by arbitration a controversy thereafter arising out of such contract or
5 transaction.” There is no transaction here affecting commerce by the FUAP, assuming it is the
6 only contract. There is no evidence in the record of how such contract can affect commerce.

7 This FAA by its explicit terms does not apply absent proof of a contract. Respondent has
8 failed to establish the existence of a contract.

9 Below, we show there is no transaction and no controversy. The reason of course is that
10 no employee has presented a claim or transaction since the FUAP prevents the vindication of any
11 right and the employees have been thoroughly intimidated so that they have not exercised their
12 section 7 rights under the FUAP. It is just like any employer who maintains an invalid no
13 solicitation rule, there is no solicitation which the Act protects because employees are afraid of
14 losing their jobs if the violate company rules.

15 Below we address the question of whether the FAA can apply to activity which does not
16 affect commerce. The ALJ did not address this issue to put the issues clearly before the Board
17 which now must address it. Assumed or hypothetical jurisdiction is prohibited. *Ex parte*
18 *McCardle*, 74 U.S. 506, 514 (1868). *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83,
19 101-102 (1998).

20 **IV. THE BOARD MUST USE THIS CASE TO ADDRESS THE CONSTITUTIONAL**
21 **ISSUE OF WHETHER THE FAA CAN BE APPLIED TO ACTIVITY WHICH**
22 **DOES NOT AFFECT COMMERCE**

23 **A. INTRODUCTION**

24 The Board has never addressed squarely the question of whether the FAA may be applied
25 to a FUAP without constitutional concerns under the Commerce Clause.⁴ We address those

26 ³ As we note below this precludes the application of the FUAP to any other state or federal law and renders
27 it substantively invalid.

28 ⁴ In *FAA Concord H, Inc.*, 363 NLRB No. 136 (2016) the Board affirmed without comment a conclusion
by the ALJ that the FAA applies to the interstate activity of the employer, not the activity of dispute
resolution or the employment dispute. In Case 20-CA-139745, JD(SF)-36-15 the **same** Administrative
Law Judge reversed herself and agreed that the Federal Arbitration Act does not apply agreeing that there

1 issues below.

2 First, assuming there was an individual contract, there is no showing that such a contract
3 that includes the FUAP affects commerce. Second, we agree that an employment dispute itself is
4 an activity, and the employer must show that activity affects commerce. Third, the employer
5 must show that the dispute resolution activity of individual arbitration or group arbitration affects
6 commerce. Fourth, there is no “transaction” triggering the FAA. Here, the employer failed to
7 establish any constitutional basis to apply the FAA.

8 There is no inconsistency in the regulation of activity encompassed within the National
9 Labor Relations Act and finding no commerce activity regulated by the FAA. The Act regulates
10 the employer; the activity regulated is activity of employees and employers and labor
11 organizations. In contrast, the FAA regulates only a targeted activity: arbitration. It does not
12 purport to apply to employees, unions or employers and their “concerted activity for mutual aid or
13 protection.” Thus, there is no inconsistency. Here, the commerce clause issue is squarely
14 placed. The commerce allegation in the complaint which was admitted by the Respondent is that
15 it “performed services valued in excess of \$50,000.00 in states other than the state of California”
16 and “purchased and received at its San Diego, California facility goods valued in excess of
17 \$50,000.00 directly from points outside the state of California.” That purchase allegation is a
18 commerce allegation irrelevant to this dispute. There is no allegation that that purchase had
19 anything to do with any employment dispute. With that very minimal commerce allegation, we
20 proceed to analyze whether the FAA can apply.⁵ The allegation with respect to work in other
21 states is irrelevant since the FUAP at issue is limited to California.

22 The agreement does not escape this problem by the recitation:

23
24 is a constitutional problem under the Commerce clause. As argued in this brief. This issue is thoroughly
25 briefed in this case as well as that case. The Board cannot duck it because it cannot reach the merits
without deciding whether the FAA applies either as an interpretation of the statute or as a matter of
commerce clause application. Counsel for Charging Party has raised this in other cases.

26 ⁵ The allegation that “Respondent performed services in excess of \$50,000 in States other than the State of
27 California” has nothing to do with commerce allegation because there is no allegation that any of that
amount was derived from interstate commerce. It is solely to meet the Board’s own self-imposed
jurisdictional standards. *Siemons Mailing Service*, 122 NLRB 81 (1958). Robert Gorman and Matthew
28 Finkin: *Labor Law Analysis and Advocacy*, (JURIS 2013), Section 3.2.

1 The FAA applies to this agreement because the Company's
2 business involves interstate commerce. For example, the Company
buys and sells parts and materials across state lines.

3 First, the complaint acknowledges that some items are purchased from outside California.
4 As we noted, those purchases have nothing to do with employment disputes, nor is there any
5 evidence that any arbitration agreement, and in particular this arbitration agreement, covers those
6 transactions. Moreover, the parties to an agreement cannot confer federal jurisdiction on this
7 agency or court by only a recitation in the contract or document. The parties cannot confer federal
8 jurisdiction by their agreement. *Insurance Corp. v Compagnie des Bauxites*, 456 U.S. 694, 702
9 (1982). Moreover the fact that the “business affects commerce” t does not establish the factual
10 basis that a dispute affects commerce, that a transaction affects commerce, that a controversy
11 affects commerce or that any arbitration affects commerce.⁶

12 **B. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT INVOLVING**
13 **INTERSTATE COMMERCE**

14 By its own terms, the FAA applies only to arbitration provisions that appear in a “contract
15 evidencing a transaction involving commerce” (9 U.S.C. § 2), where commerce is defined as
16 “commerce among the several States or with foreign nations.” 9 U.S.C. § 1. The Supreme Court
17 has held that under this language, “the transaction (that the contract evidences) must turn out, *in*
18 *fact*, to have involved interstate commerce.” *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513
19 U.S. 265, 277 (1995) (emphasis in original).⁷

20 Thus, the FAA cannot be applied unless there is proof that the contract containing the
21 arbitration provision involved a transaction that in fact affects interstate commerce. *Garrison v.*
22 *Palmas Del Mar Homeowners Ass’n, Inc.*, 538 F. Supp. 2d 468, 473 (D.P.R. 2008) (“[T]he FAA .
23 . . only applies when the parties allege and prove that the transaction at issue involved interstate
24 commerce”) (citing *Medina Betancourt et al. v. Cruz Azul de P.R.*, 155 D.P.R. 735, 742–43
25 (2001)); *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 106 (N.D. Ill. 1980), *aff’d.*, 653

26
27 ⁶ The language was poorly drafted and is ambiguous.

28 ⁷ The Court in *Allied-Bruce* also clarified that “the word ‘involving’ is . . . the functional equivalent of the
word ‘affecting.’” 513 U.S. at 273–74.

1 F.2d 310 (7th Cir. 1981) (“Interstate commerce is a necessary basis for application of the
2 [FAA]”).

3 In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Supreme Court
4 found that the FAA did not apply did not apply to an employment contract between *Polygraphic*
5 *Co.*, an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of
6 the company’s lithograph plant in Vermont. The Court found that the contract did not “evidence
7 a transaction involving commerce within the meaning of section 2 of the Act” because there was
8 “no showing that petitioner while performing his duties under the employment contract was
9 working ‘in’ commerce, was producing goods for commerce, or was engaging in activity that
10 affected commerce.” *Bernhardt*, 350 U.S. at 200-01.

11 Similarly, in *Slaughter v. Stewart Enterprises, Inc.*, No. C 07-01157MHP, 2007 WL
12 2255221 (N.D. Cal. Aug. 3, 2007), the court found that an “employment contract [did] not
13 involve interstate commerce as required by the [FAA]” where an employee “was employed at a
14 single location,” “his employment did not require interstate travel,” and “his activities while
15 employed with defendants as well as the events at issue in the underlying suit were confined to
16 California.” See also *Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex. App. 2003) (holding
17 FAA not applicable where services performed were confined to Texas).

18 There is no evidence that the transaction between the parties here involves interstate
19 commerce. Employees who perform work in only one state are not engaged in activity that
20 affects interstate commerce. Here, moreover, the allegation is that the Respondent maintains “a
21 warehouse facility in San Diego, California.” There is no claim that its business extended beyond
22 San Diego, California and thus there is no evidence of any impact whatsoever on interstate
23 commerce.⁸ Disputes that arise between any of its employees and Coastal may be simple, local
24 disputes governed only by state law, like one missed meal period or rest break. Some disputes
25 might not even be economic, but just claims seeking to resolve personality issues or shift

26 _____
27 ⁸ The reference to work outside California is irrelevant. There is no evidence the work of the warehouse
28 employees has any connection to the other work. The FUAP is limited to California. There is no allegation
that such work has anything to do with the FUAP. There is no evidence any statutory employee of the
Respondent performs any of that work.

1 assignments or workplace duties. Whether this kind of local dispute is submitted to individual or
2 group arbitration in its final stages will not make any difference for interstate commerce.⁹ Yet the
3 FUAP purports to govern all this activity, no matter how trivial or local. Such a private
4 arbitration agreement with an individual who does not perform work across state lines, does not
5 transport goods across state lines, and is not seeking to enforce anything other than state law is
6 not a contract evidencing a transaction involving interstate commerce.

7 The character of Coastal's "performing insulation work on ships" does not alter this
8 conclusion.¹⁰ The relevant question here is whether the transaction *between the parties* has an
9 affect on interstate commerce. The fact that one of the parties to the transaction is *independently*
10 involved in interstate commerce does not bring every contract that party enters, no matter how
11 trivial or local, within the reach of the FAA. Even though *Polygraphic Co.* was an employer that
12 engaged in interstate commerce and operated lithograph plants in multiple states, the Supreme
13 Court still determined that the arbitration agreement in the employment contract between . and
14 Bernhardt did not involve interstate commerce. *Bernhardt*, 350 U.S. at 200-01. Even though
15 Respondent is engaged in ship repair business that may impact interstate commerce, an arbitration
16 agreement between Respondent and an individual employee who does not perform work across
17 state lines is still an agreement about how to resolve generally local disputes that does not involve
18 interstate commerce. As the court observed in *Slaughter*, "[t]he existence of national companies .
19 . . does not undermine the conclusion that the activity is confined to local markets. Techniques of
20 modern finance may result in conglomerations of businesses. . . . [but] the reaches of the
21 Commerce Clause are not defined by the accidents of ownership." *Slaughter v. Stewart Enters.,*
22 *Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *7 (N.D. Cal. Aug. 3, 2007).

23 Similarly, the purchase of \$50,000 worth of product from out of state does not transform
24 the local nature of the agreement to arbitrate, since those purchases are not part of the arbitration
25 agreement but are merely incidental to the transaction. Those purchases are not governed by the

26 ⁹ For an example of a dispute where no party asserted the FAA applied, see *Carmona v. Lincoln*
27 *Millennium Car Wash, Inc.*, *supra*.

28 ¹⁰ The record does not establish that these ships are even in U. S. territorial waters. If the work is
performed overseas, the Act does not apply extraterritorially. .

1 FUAP. See *Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) (“The facts
2 that the nursing home buys supplies from out-of-state vendors . . . are insufficient to impress
3 interstate commerce regulation upon the admission contract for residential care between the
4 Oklahoma nursing home and the Oklahoma resident patient.”); *Saneii v. Robards*, 289 F.Supp.2d
5 855, 860 (W.D. Ky. 2003) (The sale of residential real estate to an out-of-state purchaser had “no
6 substantial or direct connection to interstate commerce,” since any movements across state lines
7 were “not part of the transaction itself” but merely “incidental to the real estate transaction”); *City
8 of Cut Bank v. Tom Patrick Constr., Inc.*, 963 P.2d 1283, 1287 (Mont. 1998) (The purchase of
9 insurance and materials from out of state did not impact court’s decision that construction
10 contract was a local transaction, not involving interstate commerce).

11 *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), does not change the analysis. In that
12 case, the Supreme Court held that the FAA could be applied in cases where there was no showing
13 that the individual transaction had a specific affect upon interstate commerce, so long as “in the
14 aggregate the economic activity in question would represent a general practice subject to federal
15 control” and “that general practice bear[s] on interstate commerce in a substantial way.”
16 *Alafabco*, 539 U.S. at 56–57 (internal citations omitted). Under this standard, the Court found
17 that the application of the FAA to certain debt-restructuring contracts was justified given the
18 “broad impact of commercial lending on the national economy” and the facts that the restructured
19 debt was secured by inventory assembled from out-of-state parts and that it was used to engage in
20 interstate business. *Alafabco*, 539 U.S. at 57–58.¹¹ As the ALJ and other courts have observed,
21 the logic used by the *Alafabco* court to justify the application of the FAA to a large financial
22 transaction between a bank and a multistate manufacturer is not readily applicable to a private
23 arbitration agreement covering claims that a local employment contract has been breached.
24 *Slaughter v. Stewart Enters., Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *4 (N.D. Cal.
25 Aug. 3, 2007) (distinguishing the “debt-restructuring contracts involving a manufacturer” at issue
26

27 ¹¹ Notably, private arbitration agreements on their own were not held to constitute a “general practice”
28 that “bear[s] on interstate commerce in a substantial way.” Instead, the Court relied on other
characteristics of the transaction at issue to find the required connection to interstate commerce.

1 in *Alafabco* from a contract “for service type employment that occurred solely within the state”);
2 see also *Bridas v. Int’l Standard Elec. Corp.*, 490 N.Y.S.2d 711, 717 n.3 (N.Y. Sup. Ct. 1985)
3 (contrasting “an agreement based upon a multimillion dollar transfer of stock between an
4 American and Argentine corporation” and the simple allegation of breach of an employment
5 contract at issue in *Bernhardt*). Private arbitration agreements with employees who do not
6 perform work across state lines, do not transport goods across state lines, and are not seeking to
7 enforce anything other than state law are not contracts that involve interstate commerce in the
8 way major debt-restructuring contracts did.

9 *FAA Concord H. Inc*, *supra*, is incorrect. As noted the same ALJ has reversed herself and
10 found in a later case that the FAA does not apply. She stated:

11 The Charging Party argues that there is no evidence the individual MAAs with
12 the Respondent's employees affect commerce, and asserts that the activity of
13 arbitration does not affect interstate commerce. This raises the fundamental
question of what, in fact, is the “transaction involving commerce” the MAA
evidences to bring it within the FAA's reach?

14 The FAA, at 9 USC § 2, applies to a “written provision in any maritime
15 transaction or a contract evidencing a transaction involving commerce to settle
16 by arbitration a controversy thereafter arising out of such contract or
17 transaction . . .” Specifically excluded, however, are “contracts of
18 employment of seamen, railroad employees, or any other class of workers
19 engaged in foreign or interstate commerce.” 9 USC § 1. The Supreme Court in
20 *Circuit City* interpreted this exclusionary provision, “any other class of
21 workers engaged in foreign or interstate commerce,” narrowly, and held it
22 applied only to workers actually working in commercial industries similar to
seamen and railroad employees. Relying on *Allied-Bruce Terminix
Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Court in *Circuit City*
interpreted Section 2's inclusion provision, a “contract evidencing a
transaction involving commerce,” broadly, finding it was not limited to
transactions similar to maritime transactions. In line with these interpretations,
most contracts of employment fall within the FAA's reach, regardless of
whether the employees themselves are involved in any traditionally-defined
commercial transactions as part of their work.

23 In *Allied-Bruce Terminix*, *supra*, the Supreme Court examined the phrase
24 ““evidencing a transaction” involving commerce and determined that “the
25 transaction (that the contract ‘evidences’) must turn out, *in fact* . . . [to] have
26 involved interstate commerce[.]” (emphasis in original). A prior Supreme
27 Court case, *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956),
28 that like *Circuit City* and *Allied-Bruce Terminix* interpreted the words
““involving commerce” as broadly as the words “affecting commerce,”
involved an employment contract between Polygraphic Co., an employer
engaged in interstate commerce, and Norman Bernhardt, the superintendent of
Polygraphic Co.'s Vermont plant. The employment contract at issue contained
a provision that in case of any dispute, the parties would submit the matter to

1 arbitration by the American Arbitration Association.

2 The Supreme Court found the FAA did not apply because the company did
3 not show that the employee, “while performing his duties under the
4 employment contract was working ‘in’ commerce, was producing goods for
commerce, or was engaging in activity that affected commerce, within the
meaning of our decisions.”¹²

5 Here, the contract at issue is the MAA. There is no other employment contract
6 implicated in the complaint or the answer. By virtue of the MAA, the
7 employee and employer have transacted an agreement to resolve employment
8 disputes through arbitration. What is analytically more difficult about the
9 MAA and similar agreements, when compared with most contracts, is that the
10 arbitration agreement itself is part of the consideration for the transaction. The
11 agreement here states that the “Mutual Arbitration Agreement . . . is made in
12 consideration for the continued at-will employment of the Employee, the
13 benefits and compensation provided by Company to Employee, and
14 Employee's and Company's mutual agreement to arbitrate as provided in this
15 Agreement.”¹⁵ (Jt. Exh. I p. 55; Jt. Exh. J p. 56.) Generally, when a contract is
involved, the arbitration agreement is a means to solve a contract dispute, and
the terms of the agreement spell out independent consideration. *For example,*
16 *in Allied-Bruce Terminix*, consideration for the termite bond at issue was
17 money. In *Buckeye Check Cashing*, individuals entered into “various deferred-
18 payment transactions with . . . Buckeye . . . in which they received cash in
19 exchange for a personal check in the amount of the cash plus a finance
20 charge.” 546 U.S. at 440. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500
21 U.S. 20 (1991), the arbitration agreement was part of an application to register
22 with the New York Stock Exchange. In none of these cases was the agreement
23 to arbitrate itself consideration in the “contract evidencing a transaction
24 involving commerce.”

25 The MAA's terms, including the “consideration” of the individual arbitral
26 process, are not implicated until there is an employment dispute. In other
27 words, an employment dispute is a condition precedent to performance under
28 the MAA. In typical transactions, a dispute is not necessary for the terms of
the agreement to be exercised. For example, in *Buckeye*, the check cashing
company provided cash to the individuals as consideration for the individuals
signing over their checks and paying a fee. These transactions could play out
indefinitely without the arbitration agreement provision ever coming into play.
If the individuals in *Buckeye* performed their end of the bargain by turning
over their checks and the check cashing company sat idle, a dispute would
arise. Conversely, there would be no need for the check cashing company to
do anything if the individual never presented it with a check to cash. Not so
here, if the employees' work is part of the consideration. At all times prior to
the advent of a covered dispute and the invocation of a way to resolve it, the
employer is continuing to employ the employee and the employee is
continuing to perform work for the employer. Continued employment triggers
no duty on the employer or the employee with regard to the MAA. The
employee deciding not to continue employment with the Respondent, without
more, likewise triggers no duty under the MAA. It is difficult to see, therefore,
how continued employment is part of the “transaction” the MAA evidences.

Simply put, the MAA is a contract about how employment disputes will be
resolved. The “transactions” evidenced by the MAA are agreements to
arbitrate any and all employment disputes. Yes, the MAA is a condition of

1 employment, but its topic is not the work the employees will perform or the
2 conditions under which they will perform it. An employer engaged in
3 interstate commerce could require employees, as a condition of employment,
4 to sign an agreement stating that they will sit with their coworkers for
5 lunchtime on Tuesdays. The topic of this agreement is not the employee's
work duties or the employer's business, but rather who the employees will eat
lunch with on Tuesdays. It certainly would seem a stretch to find that this
agreement would be a "maritime transaction or a contract evidencing a
transaction involving commerce."

6 As noted above, the MAA applies to all employees. As the Charging Party
7 points out, some disputes covered by the MAA with some of these employees
would likely affect commerce, and other minor disputes likely would not.
8 Take the example of a security worker who walks a block to work (not across
state lines) at the same Hobby Lobby store each day. It is hard to see how an
9 individual arbitration, required by the MAA, about a disagreement over the
timing of this security worker's lunch break evidences any transaction
10 involving commerce. The fact that the employer is engaged in interstate
commerce does not, in my view, render any individual agreement to arbitrate
11 an employment dispute as a "contract evidencing a transaction involving
commerce" because it is not the employer's business of producing and selling
12 goods in interstate commerce comprising the "transaction" evidenced by the
MAA. To interpret the FAA this broadly would finally stretch it to its
13 breaking point.

14 Even if the "transaction" the MAA contemplates is employment or continued
employment under the MAA's terms, the individual agreements do not
15 necessarily "evidence a transaction involving commerce." As in *Bernhardt*,
not all of the Respondent's employees, while performing their duties, are "in"
16 commerce, . . . producing goods for commerce, or . . . engaging in activity that
affect[s] commerce"

17 Consideration of the Supreme Court's decision in *Citizens Bank v. Alafabco*,
Inc., 539 U.S. 52 (2003), does not lead to a different finding. In *Citizen's*
18 *Bank*, the Court stated, "Congress' Commerce Clause power 'may be
exercised in individual cases without showing any specific effect upon
19 interstate commerce' if in the aggregate the economic activity in question
would represent 'a general practice . . . subject to federal control.'"D' 539 U.S.
20 at 56-57, quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar*
Co., 334 U.S. 219, 236, (1948). Citizens Bank and Alafabco, a fabrication ion
21 and construction company, entered into debt restructuring agreements that
contained an agreement to arbitrate any disputes. The Court rejected the
22 argument that the individual transactions underlying the agreements did not,
taken alone, have a "substantial effect on interstate commerce." Id. at 56.
23 First, the Court found that Alafabco engaged in interstate commerce using
loans from Citizens Bank that were renegotiated and redocumented in the
24 debt-restructuring agreements. Second, the loans at issue were secured by
goods assembled out-of-state. Finally, the Court relied upon the "broad impact
25 of commercial lending on the national economy [and] Congress' power to
regulate that activity pursuant to the Commerce Clause." The arbitration
26 agreements between the Respondent and the individual employees in this case
do not fall within any of these rationales.

27 The Charging Party, pointing out that the FAA derives its authority from the
28 Commerce Clause, cites to *National Federation of Independent Businesses v.*

1 *Sebelius*, 132 S.Ct. 2566 (2012). *Sebelius* discusses the Commerce Clause in
2 relation to Affordable Healthcare Act's (ACA) provision requiring individuals
3 to buy health insurance, commonly known as the individual mandate. In
4 describing the reach of the Commerce Clause in *Sebelius*, the Court observed,
5 "Our precedent also reflects this understanding. As expansive as our cases
6 construing the scope of the commerce power have been, they all have one
7 thing in common: They uniformly describe the power as reaching
8 'activity.'"D' The Court determined that the "activity" at issue with regard to
9 the individual mandate was the purchase of healthcare insurance, and that
10 under the Commerce Clause, Congress was not empowered to regulate the
11 failure to engage in this activity. Under this analysis, the "activity" the MAA
12 concerns is resolution of employment disputes. For the reasons described
13 above, this "activity" does not necessarily affect interstate commerce,
14 particularly in cases where no dispute with regard to employment under the
15 MAA ever arises.

16 Based on the foregoing, I agree with the Charging Party that the Respondent
17 has made no showing that an arbitration agreement between the Respondent
18 and any of its individual employees affects commerce.

19 *Hobby Lobby Stores, Inc. & the Comm. to Pres. the Religious Right to Organize*, 20-CA-139745,
20 2015 WL 5241738 (Sept. 8, 2015) (footnotes omitted).

21 We agree with this analysis.

22 The FAA cannot be stretched so far as to apply to any arbitration agreement between an
23 individual and her employer just because the employer is, for other purposes, engaged in
24 interstate commerce. Such a reading of the FAA would contravene the Supreme Court's decision
25 in *Bernhardt*¹² and raise serious constitutional concerns.¹³

26 There is no transaction or controversy. Below in Part D we show there is not
27 "controversy" so the FAA does not apply.

28 **C. THIS CASE IS BEYOND THE CONSTITUTIONAL REACH OF THE FAA SINCE
THERE IS NO SHOWING THAT THE DISPUTES COVERED BY THE FUAP
AFFECT INTERSTATE COMMERCE OR THAT THE ACTIVITY OF
RESOLVING THOSE DISPUTES AFFECTS INTERSTATE COMMERCE**

Under the Commerce Clause, Congress may only regulate "'the channels of interstate
commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially

¹² In *Bernhardt*, the Court explained that the FAA should be construed narrowly, so as not apply to an
arbitration agreement between a multistate lithograph company and an employee who did not work across
state lines. The Court warned that allowing the FAA to reach such transactions that did not affect
interstate commerce would impermissibly "invade the local law field." *Bernhardt*, 350 U.S. at 202.

¹³ In effect this would mean that once commerce jurisdiction is established for one purpose, it would be
established for all federal question purposes.

1 affect interstate commerce.’’ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2578 (2012)
2 (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). Because the FAA was enacted
3 pursuant to the Commerce Clause (*Perry v. Thomas*, 482 U.S. 483, 490 (1987)), it cannot
4 constitutionally be applied here unless the regulated activity has this connection to interstate
5 commerce.

6 The fact that the employer in this case is for other purposes and independently engaged in
7 interstate commerce cannot supply the necessary connection to commerce, because the FAA is
8 not a regulation of the employer or the employer’s business. In *Sebelius*, the Supreme Court
9 made it clear that Congress may only use its authority under the Commerce Clause “to regulate
10 classes of *activities*,” “not classes of *individuals*, apart from any activity in which they are
11 engaged.” *Sebelius*, 132 S.Ct. at 2591 (emphasis in original). Thus, in determining whether a
12 regulation is permissible under the Commerce Clause, the court must not look at the class of
13 individuals affected by the law, but at the actual activities that are being targeted by the law.
14 Following this analysis, the Court ruled that the individual mandate could not be characterized as
15 a regulation of individuals who would eventually consume healthcare, because that is just a class
16 of individuals and not the actual activity regulated by the ACA. *Id.* at 2590-91. Similarly here,
17 the FAA cannot be characterized as a regulation of employers engaged in interstate commerce,
18 because that is just a class of corporate individuals and not the actual activity regulated by the
19 FAA.

20 The actual activity regulated by the FAA is the resolution of disputes between private
21 individuals. The FAA does not seek to regulate how the employer conducts its business or carries
22 out its commercial activities. The FAA does not purport to regulate any activity other than the
23 narrow aspect of dispute resolution in arbitration.¹⁴ This is the actual activity Congress sought to
24 regulate in the FAA, and such a law passed pursuant to the Commerce Clause cannot be
25 constitutionally applied to the dispute resolution activity here unless this activity is connected to
26 interstate commerce. See *Sebelius*, 132 S.Ct. at 2578.

27
28 ¹⁴ In contrast the NLRA regulates dispute resolution through strikes and boycotts.

1 The activity of resolving disputes between private individuals is not a “channel of
2 interstate commerce,” it is not a person or thing “in” interstate commerce, and whether the
3 disputes covered by the FUAP here are resolved in individual or group arbitration does not
4 “substantially affect interstate commerce.” *Sebelius*, 132 S.Ct. at 2578 (quoting *Morrison*, 529
5 U.S. at 609). Many of the disputes covered by the FUAP do not implicate interstate commerce or
6 have any substantial affect on interstate commerce. The FUAP is drafted in a way that would
7 extend to any employment dispute. It could encompass a claim for one hour’s pay, one missed
8 meal period or rest break, or any other claim that has no impact whatsoever on interstate
9 commerce. It would encompass a claim that was not economic at all, but just an effort to resolve
10 personality issues or shift assignments or workplace duties. See JX 2I p. 12-13 and JX 2J p. 13.
11 If two employees had a “conflict” that was not economic and asked for joint collective arbitration,
12 that dispute would not have any impact on interstate commerce. All non-economic disputes that
13 would have no impact on commerce are covered. Such local disputes governed by state contract
14 law or state labor law lack any substantial connection to interstate commerce. If the dispute does
15 not affect interstate commerce, regulation of the resolution of the dispute is not within the scope
16 of the Commerce Clause, and the FAA cannot constitutionally apply. Whether a dispute between
17 Coastal and any of its employees is ultimately resolved in individual or group arbitration does not
18 have an impact on any issue of interstate commerce. Because the employer has not shown that
19 the disputes covered by the FUAP would affect interstate commerce or that the activity of
20 resolving those disputes in individual or group arbitration would affect interstate commerce, the
21 FAA cannot constitutionally be applied here.

22 Even though the FAA cannot constitutionally target the dispute resolution activity here,¹⁵
23 the NLRA can constitutionally regulate dispute resolution activity between employers and their
24 employees. This is not anomalous. The NLRA was passed pursuant to explicit Congressional
25 findings that “[t]he inequality of bargaining power between employees who do not possess full

26
27 ¹⁵ The courts in *Stampolis v. Provident Auto Leasing Co.*, 586 F.Supp.2d 88 (E.D.N.Y. 2008), and *City of*
28 *New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), recognized that litigation is different from the activity
of the entity involved in the litigation. See also *Rodriguez v. Testa*, 296 Conn. 1, 26, 993 A.2d 955, 969
(2010) (finding statute constitutional under Commerce Clause because it regulates industry, not litigation).

1 freedom of association or actual liberty of contract and employers who are organized in the
2 corporate or other forms of ownership association substantially burdens and affects the flow of
3 commerce.” 29 U.S.C. § 151. The Supreme Court has explained that Section 7 of the NLRA
4 embodies the effort of Congress to remedy this problem. *NLRB v. City Disposal Sys. Inc.*, 465
5 U.S. 822, 835 (1984) (“[I]t is evident that, in enacting §7 of the NLRA, Congress sought
6 generally to equalize the bargaining power of the employee with that of his employer by allowing
7 employees to band together in confronting an employer regarding the terms and conditions of
8 their employment.”). The NLRA can thus reach dispute resolution as a necessary part of its
9 regulation of the employment relationship, designed to address the inequality in bargaining power
10 that burdens interstate commerce. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37
11 (1937) (recognizing that regulation of local, intrastate activity is permissible as a necessary part of
12 a larger regulatory scheme). Unlike the NLRA, the FAA is not a larger regulation of employment
13 and does not seek to change the fundamental ways employers and workers relate to each other in
14 order to confront the labor strife that impedes interstate commerce. It seeks to regulate the private
15 dispute resolution activity of individuals apart from its content or context and this is
16 impermissible.

17 Congress may not focus on the intrastate dispute resolution activities of private
18 individuals apart from a larger regulation of economic activity. See *United States v. Lopez*, 514
19 U.S. 549, 558 (1995) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)) (The Court has
20 never declared that “‘Congress may use a relatively trivial impact on commerce as an excuse for
21 broad general regulation of state or private activities.’ Rather, ‘the Court has said only that *where*
22 *a general regulatory statute bears a substantial relation to commerce*, the de minimis character of
23 individual instances arising under that statute is of no consequence.” (emphasis in original)).
24 The Supreme Court has said that regulation of intrastate activity is permissible where it is one of
25 the “essential parts of a larger regulation of economic activity” and the “regulatory scheme could
26 be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561. The relevant
27 statutory regime here is the FAA. By its terms, the FAA addresses only individual transactions.
28 9 U.S.C. § 2 (applying the terms of the act to “a written provision in any maritime transaction or

1 contract evidencing a transaction involving commerce”). Therefore, the regulatory scheme does
2 not encompass wide sectors of economic activity in a general fashion but rather applies to
3 individual transactions or contracts. Regulation of a local dispute that does not itself have any
4 effect on interstate commerce is not a necessary part of the regulatory scheme. Similarly, failure
5 to enforce arbitration provisions in purely intrastate contracts would not subvert the entire
6 statutory scheme in the same way as the failure to regulate purely intrastate marijuana production
7 would undercut regulation of interstate marijuana trafficking. *Gonzales v. Raich*, 545 U.S. 1, 26
8 (2005). Because regulation of the intrastate activity here is “not an essential part of a larger
9 regulation of economic activity, in which the regulatory scheme could be undercut unless the
10 intrastate activity were regulated,” it “cannot . . . be sustained under our cases upholding
11 regulations of activities that arise out of or are connected with a commercial transaction, which
12 viewed in the aggregate, substantially affects interstate commerce.” *Lopez*, 514 U.S. at 561. As a
13 result, there are no constitutional grounds for applying the FAA to intrastate dispute resolution
14 activity that bears only a trivial affect on interstate commerce.

15 Because the application of the FAA depends on the Commerce Clause, and because the
16 forum in which this employment dispute is resolved does not have a substantial affect on
17 interstate commerce, the FAA cannot be used to prohibit or interfere with protected concerted
18 activity under the NLRA.

19 **D. THERE IS NO “CONTROVERSY” SUBJECT TO THE FAA**

20 The ALJ ignored this issue.

21 The FAA applies to “a contract evidencing a transaction involving commerce to settle by
22 arbitration a controversy thereafter arising out of such contract or transaction.” There is no
23 controversy here. No employee has asserted any claim.¹⁶ No employee has asserted any claim
24 because the FUAP is not an effective means of resolving individual or group claims. Group or
25 class claims are prohibited. The FAA is only triggered by its terms when there is a “controversy.”
26

27
28 ¹⁶ The dispute over whether the FUAP violates the NLRA is excluded from the FUAP and cannot be the
basis to establish a controversy.

None exists here except whether the provision violates the Act.¹⁷ Thus, until a concrete controversy develops, the FAA cannot be applied. None exists precisely because it is illegal. Like any unlawful employer maintained rule, the rule serves its purpose to prevent the lawful conduct. Such rules effectively chill employees' rights and thus serve their intended purpose.

E. THE RESPONDENT'S ANALYSIS, IF ANY, SHOULD BE REJECTED

The Respondent did not rely on *Alafabco, supra*. The ALJ did not comment either. We have discussed it above. When the Supreme Court addressed the Commerce Clause question in *Alafabco*, it notably did not find that private arbitration agreements on their own were a "general practice" that "bear[s] on interstate commerce in a substantial way." The Court instead relied on other characteristics of the transaction at issue—a multimillion dollar debt restructuring contract between a bank and a multistate manufacturer—to find the necessary connection to interstate commerce. Here, there is no evidence that individual or group "disputes" affect commerce. The employer's potential argument may be that as long as its repair business affects commerce, any employment dispute must also affect commerce.¹⁸ That statement of Respondent's potential position demonstrates that it is not logical.

F. SUMMARY

In summary, the National Labor Relations Act may regulate the activities of this employer because of the impact on commerce. No one disputes that. The Federal Arbitration Act, however, regulates the specific activity of dispute resolution in the form of arbitration, and that activity does not affect commerce within the Commerce Clause. Alternatively, the FAA regulates only employment disputes that affect commerce. Further, there is no contract subject to the FAA nor is there any controversy subject to the FAA. Finally there is no controversy.

The Board must address this constitutional issue. It cannot do so by applying the doctrine

¹⁷ This proves the chilling effect of the language prohibiting group claims.

¹⁸ Thus the aggregation argument based on *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), and *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002), is inapposite. Neither of these cases involved challenges based on the reach of the commerce power, and so the Supreme Court did not address the statutory question of whether the arbitration agreements in these cases were part of contracts evidencing transactions involving commerce or the constitutional question of whether the FAA could constitutionally be applied in such situations.

1 of constitutional avoidance. Here, Respondent will rely for its core argument on the FAA. Either
2 it applies or it doesn't. The Board cannot duck and weave and avoid.¹⁹

3 **V. THE APPLICATION OF THE FEDERAL ARBITRATION ACT CANNOT**
4 **OVERRIDE THE IMPORTANT PURPOSES OF OTHER FEDERAL STATUTES**
5 **THAT ALLOW EMPLOYEES TO SEEK RELIEF FROM THE FEDERAL**
6 **GOVERNMENT FOR THE BENEFIT OF THEMSELVES AND OTHER**
7 **WORKERS**

8 The ALJ ignored this issue.

9 The Board must address directly the question of whether the Federal Arbitration Act may
10 trump the application of the National Labor Relations Act as to other federal statutes that allow
11 whistle-blowing or independent administrative remedies. As the Board correctly found in *Murphy*
12 *Oil USA, Inc., supra*, there are important purposes underpinning Section 7 that are not addressed
13 by the Federal Arbitration Act. That equally applies to claims that employees can make under
14 other federal statutes regarding workplace issues.²⁰ Here, we point out that the FUAP provision
15 effectively undermines those other federal statutes. Thus, the restriction found in the FUAP, that
16 “All claims brought under this binding arbitration agreement shall be brought in the individual
17 capacity of myself or the Company” would interfere with other federal statutory schemes, which
18 envision and, in some cases, require remedies that will affect a group. The Board has been
19 admonished by the Supreme Court in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137
20 (2002), that it must respect other federal enactments.²¹ Here, the Board should recognize that
21 there are many federal statutes that allow group, collective or class claims or even individual
22 claims that affect a group. The FAA cannot be used to defeat the purposes of those statutes.

23 ¹⁹ This issue has been presented to the Board in three other cases by Counsel for Charging Party in this
24 case. See Motion to Allow Oral Argument filed in *Hobby Lobby*, Case No. 20-CA-139745. It has now
25 been also addressed in a fourth case pending before the Board. *SJK, Inc., D/B/A Fremont Ford*, Case 32-
26 CA-151443 (pending on motion for summary judgment)

27 ²⁰ We emphasize that what is not at issue is the individual right of employees to file claims of any kind
28 with federal agencies or in federal court. Where the action is not concerted and not for mutual aid or
protection, the NLRA is not implicated. It is only when the action is concerted and for mutual aid or
protection that NLRA Section 7 protection is triggered. This discussion assumes that an employee may
invoke these other federal laws to benefit herself and other employees. Thus the resort to the court or
agencies or arbitration must satisfy the Board's application of *Meyers Industries, Inc.* 281 NLRB 882
(1986). We do not however believe *Meyers Industries* survives recent board cases and the board should
return to the doctrine of *Alleluia Cushion Co.* 221 NLRB 999 (1975). *Meyers* is fundamentally
inconsistent with *Fresh & Easy Neighborhood Market*, 361 NLRB No 12 (2014).

²¹ Any assertion by Respondent that the FAA trumps the NLRA is another example.

1 Employees have the right to bring to various federal agencies all kinds of issues that affect
2 them and other workers. Under these statutes, they have the right to seek relief from those
3 agencies for their own benefit as well as for the benefit of other workers or employees of the
4 employer. Those remedies can involve government investigations, injunctive relief, and federal
5 court actions by those agencies, and debarment from federal contracts, workplace monitoring and
6 many other remedies that would be collective and concerted in nature.

7 In effect, the FUAP would prohibit an employee from invoking on his/her behalf, as well
8 as on behalf of other employees, protections of these various federal statutes. It would prohibit
9 the agency or the court from remedying violations of the law that the agency or court would be
10 empowered, if not required, to remedy.

11 The Congressional Research Service has identified forty different federal laws that contain
12 anti-retaliation and whistleblower protection. *See Jon O. Shimabukuro et al., Cong. Research*
13 *Serv. Report No. R43045, Survey of Federal Whistleblower and Anti-Retaliation Laws* (April 22,
14 2013), *available at* <http://fas.org/sgp/crs/misc/R43045.pdf>. These are all laws that relate directly
15 to workplace issues. Nothing in the Federal Arbitration Act preempts the application of other
16 federal laws. Some examples are mentioned below.

17 The Federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, allows for the District
18 Courts to grant injunctive relief to “restrain violations of [the Act].” See 29 U.S.C. § 217²². The
19 application of the FUAP would prevent an individual or a group of individuals from seeking
20 injunctive relief that would apply to all employees or apply in the future to themselves and other
21 employees. It would undermine the purposes behind the FLSA to allow for such injunctive
22 relief.²³

23 The same is true with respect to ERISA, 29 U.S.C. § 1001, *et seq.* The FUAP would

24
25 ²² It is not contradictory to refer to the rights under federal statutes and raise the question of commerce
26 jurisdiction with respect to the FAA. The difference is that the FAA regulates dispute resolution or the
employment dispute, not the business or commerce activity of the employer.

27 ²³ Even a claim by an employee that she was not paid for overtime after 40 hours, as required by the
28 FLSA, would not affect commerce. The claim could be based on the promise in the handbook to pay
overtime. And because the worker was prohibited from bringing the claim in court, the advancement of
that claim for a few dollars of overtime would not affect commerce for FAA purposes.

1 prohibit an employee from going to court with respect to a claim involving a benefit covered by
2 ERISA, even though the statute expressly allows for equitable relief. 29 U.S.C. § 1132(a)(1) and
3 (3). And as noted below by extending this expressly to “all disputes that may rise out of or be
4 related in any way to my employment, ” the FUAP violates ERISA. Thus the prohibition against
5 bringing group or collective claims which ERISA permits, is invalid.

6 The FUAP would prevent employees from bringing a complaint to OSHA seeking
7 investigation and correction of worksite problems affecting all employees where action after the
8 investigation would be necessary.

9 The FUAP would prevent an employee from filing an EEOC charge that could lead to
10 EEOC court action seeking systemic or class wide relief. It would prevent the employees from
11 participating in systemic charge investigations. 42 U.S. C. § 2000e-8(a). Commissioners may file
12 charges on their own. 42 U.S. C. § 2000e-5(b), which the FUAP would prohibit.

13 The FUAP would prevent employees from bringing unlawful immigration practices to the
14 attention of the Office of Special Counsel. (<http://www.justice.gov/crt/about/osc/>.)

15 It would prohibit anonymous actions which are permitted under some circumstances.
16 *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir.2000).

17 The FUAP would prohibit actions under the federal False Claims Act.
18 ([http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-](http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf)
19 [FRAUDS_FCA_Primer.pdf](http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf).) An employee could not, for example, claim that on a federal Davis-
20 Bacon project, the employer made false claims for payment while not paying the prevailing wage.
21 An employee could not claim, along with others, that the employer is overcharging on a
22 government contract. See *United States v. Circle C Constr.*, 697 F.3d 345 (6th Cir. 2012). This
23 kind of litigation serves an important public purpose but would be foreclosed by the FUAP. This
24 kind of claim is necessarily brought as a group action, since the relief sought includes a remedy
25 for the underpayment of a group of workers.

26 The FUAP allows the filing of individual claims with only two agencies but does not
27 allow group claims with those agencies. It does not allow charges filed with any other agencies
28 such as the Department of Labor, OSHA and so on.

1 The FUAP would prohibit an employee from bringing a claim to the Department of Labor
2 that the employer violates the provisions of the Fair Labor Standards Act regarding employment
3 of minors unless the individual were herself an under-aged minor.

4 The FUAP, by its terms, undermines the enforcement of these federal statutes, which
5 envision private efforts to enforce their purposes for all employees and for the public interest.

6 There is no escaping the conclusion that there are a multitude of federal laws that govern
7 the workplace. The FUAP prohibits an employee acting collectively or to benefit others²⁴ from
8 seeking assistance before those agencies and in court to effectuate the purposes of those statutes.
9 The FUAP would prohibit the employee from doing so for the benefit of employees acting
10 collectively. The purposes of those statutes would include not only individual relief for the
11 employee himself or herself, but also relief that would protect the public interest in enforcement
12 of those statutes.²⁵

13 For these reasons, the FUAP itself is invalid, not only because it would prohibit an
14 employee from seeking concerted relief with respect to other federal statutes, but also because it
15 would prohibit the employee from seeking relief that would benefit other employees. The FAA
16 cannot serve to interfere with the enforcement of other federal statutes. As we show, this conflict
17 is particularly heightened with the RFRA, which expressly overrides other federal statutes. The
18 Board should expressly rule that the application of the FAA interferes with important policies
19 under other federal statutes.

20 VI. THE CHECK THE BOX OPT-OUT PROVISION

21 In a further effort to restrict employee rights, someone thought it would be appropriate to
22 have a check the box so that the employee would be forced to disclose his or her objection to the
23 unlawful FUAP. First, let us be clear that this FUAP is unlawful. Thus, the employee would be
24 forced to disclose her opposition to the unlawful FUAP. Even assuming it was not unlawful, the

25 ²⁴ The FUAP would prevent an employee from seeking assistance of others to proceed collectively. An
26 employee could be disciplined for seeking to invoke a collective action on the theory that this would
violate the company policy contained in the FUAP.

27 ²⁵ The U.S. Supreme Court has not addressed this issue in any employment arbitration cases since each
28 case has been an individual claim without the argument that the claim serves any public purpose.
Iskanian, supra, is based on that principle.

1 employee would be forced to disclose her opposition to waiving her collective rights. Third, the
2 Board has ruled that these check the box provisions are not a method by which the unlawful
3 conditions under FUAP can be rendered lawful. See *Professional Janitorial Service*, 363 NLRB
4 No. 35 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189 (2015); and *Bristol Farms*,
5 363 NLRB No. 45 (2015).²⁶

6 The ALJ correctly found that the check-the-box provision did not save the FUAP. See,
7 ALJD p 4. But that does not address the interrogation aspect of the box.

8 The check the box is an unlawful forced disclosure of intended or potential concerted
9 activity and is a form of unlawful interrogation. See, cases cited above.

10 **VII. THE ATTEMPT TO FORCLOSE COURT REVIEW RENDERS THE FUAP**
11 **UNLAWFUL**

12 The ALJ did not address this issue.

13 The Ninth Circuit has squarely held that any non-appealability clause in arbitration
14 agreement is invalid under the FAA. See *In re Walmart Wage and Hour Employment Practices*
15 *Litigation*, 737 F. 3d 1262 (9th Cir 2015). See also *Hall Street Associates, LLC v. National, Inc.*,
16 552 U.S. 576 (2008). If the employer asserts the FAA governs, as it will, then the FUAP is
17 unenforceable.

18 It is also unenforceable under state law.

19 **VIII. THE FUAP WOULD PROHIBIT COLLECTIVE ACTIONS THAT ARE NOT**
20 **PREEMPTED BY FAA UNDER STATE LAW**

21 The ALJ did not address this issue.

22 This issue arises because the FUAP applies in California.²⁷ The California Supreme
23 Court has ruled that an arbitration agreement cannot foreclose application of the Private Attorney
24 General Act, Labor Code § 2699 and 2699.3. See *Iskanian v. C.L.S. Transp.*, 59 Cal.4th 348

25 ²⁶ Paragraph 4 does not save the Respondent. It only assures employees they will not be disciplined “for
26 opposing the arbitration provisions of this Agreement.” It does not say they can check the box without
27 other consequences. It does not say they will be hired if they check the box. It is an ambiguity which
28 renders the FUAP unlawful.

²⁷ The burden is on the employer to show that there is no other state law that would apply in the same
way.

1 (2014), *cert. denied* 135 S. Ct. 1155(2015). See also *Sakkab v. Luxottica Retail N. Am., Inc.*, 803
2 F.3d 425 (9th Cir. 2015).

3 There are numerous other provisions in the Labor Code that permit concerted action. See,
4 e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert. denied*, 134 S.Ct. 2724
5 (2014) (arbitration policy cannot categorically prohibit a worker from taking claims to Labor
6 Commissioner, although state law is also preempted from categorically allowing all claims to
7 proceed before the Labor Commissioner in the face of an arbitration policy).

8 The FUAP interferes with the substantive right of the California Labor Commissioner to
9 enforce the wage provisions of the Labor Code. See, e.g., Cal. Lab. Code § 217.

10 There are, additionally, various provisions in the California Labor Code that allow only
11 the Labor Commissioner to award penalties or grant other relief. The enforcement of the FUAP
12 would prevent employees from collectively going to the Labor Commissioner seeking these
13 penalties for themselves or other employees. It would foreclose an employee from asking the
14 Labor Commissioner to seek remedies for a group of employees. See, e.g., Cal. Lab. Code §
15 210(b) (allowing only the Labor Commissioner to impose specified penalties); Cal. Lab. Code §
16 218 (authority of district attorney to bring action); Cal. Lab. Code § 225.5(b) (penalty recovered
17 by Labor Commissioner). IWC Order 16, Section 18(A)(3), *available at*
18 <https://www.dir.ca.gov/iwc/IWCArticle16.pdf>. Employees could not collectively seek
19 enforcement of these remedies because the FUAP prohibits them from bringing claims
20 collectively to that agency.

21 The recently enacted sick pay law may only be enforceable by the Labor Commissioner.
22 See Cal. Lab. Code § 245 (effective July 1, 2015). The FUAP would foreclose enforcement of
23 this new law. Individuals or groups of individuals do not have the right to enforce the law in
24 court or before an arbitrator. For purposes of this case, it would foreclose concerted enforcement
25 of the new law since the arbitration process would not be authorized to enforce a law given
26 exclusively to the Labor Commissioner. It would prevent other public officers from enforcing
27 state law for a class or group upon complaint by employees. Cal. Bus. & Prof. Code § 17204.

28 Additionally, under state law, there are a number of whistleblower statutes just as there

1 are under federal law. The FUAP would prohibit employees from invoking those statutes for
2 relief that would affect them as well as others. The Labor Commissioner lists thirty-three
3 separate statutes that contain anti-retaliation procedures. See
4 <http://www.dir.ca.gov/dlse/FilingADiscriminationComplaint1.pdf>.

5 California has strong statutory protection for whistleblowers. See Cal. Lab. Code § 1101
6 and 1102. The FUAP defeats the purposes of those statutes that allow groups to bring claims
7 forward to vindicate the public purpose animating those provisions.

8 Just as the California Supreme Court held in *Iskanian*, there are important public purposes
9 animating these statutes that allow employees to seek assistance from either state agencies or the
10 court system. To prevent employees from seeking relief for other employees in the workplace
11 would effectively deprive them of substantive rights guaranteed by state law. The FAA does not
12 preempt such state laws. See *Iskanian*, *supra*.

13 The Board must address the question of the application of *Iskanian* and similar doctrines.
14 The FUAP is invalid because it prohibits the exercise of important state law rights, which serves
15 an important public purpose. Once again, the burden is on the employer to prove that the FUAP
16 does not interfere with other non-preempted state law.

17 **IX. THE FUAP UNLAWFULLY PROHIBITS GROUP CLAIMS THAT ARE NOT**
18 **CLASS ACTIONS, REPRESENTATIVE ACTIONS, COLLECTIVE ACTIONS OR**
19 **OTHER PROCEDURAL DEVICES AVAILABLE IN COURT OR OTHER FORA**

20 The ALJ did not address this issue.

21 The cases focus on the rights of employees to use collective procedures in courts and other
22 adjudicatory *fora*. Here, we make the point that employees have the right to bring their collective
23 disputes together as a group. Or a group or individual can represent others to bring a group
24 complaint. The FUAP prohibits such group claims or consolidation.²⁸ It expressly prohibits the
25 "consolidation or joinder of other claims or controversies."

26 It would prohibit anonymous actions which are permitted under some circumstances.

27 ²⁸ As to this theory, the Board does not have to address the argument made in those dissents that
28 employees do not have the right to invoke the formalized procedures available in court such as class
actions or collective actions.

1 *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir.2000).

2 This is an essential point here. It responds to the repeated dissents of Member Miscimarra
3 and former Member Johnson. This point responds to arguments likely to be made by the
4 employer. These are claims brought by two or more employees. There is no need to invoke class
5 action, collective action or any procedural form of collective actions. It is just two or more
6 employees bringing the same claim and assisting each other. Alternatively, it can be two or more
7 employees bringing a complaint that would require the participation of other employees and
8 would affect them. The Board needs to make it clear that such group claims stand apart from
9 class actions, collective actions, and representative actions that invoke court adopted procedures.
10 The Board should address this issue.

11 **X. THE FUAP IS INVALID AND INTERFERES WITH SECTION 7 RIGHTS TO**
12 **RESOLVE DISPUTES BY CONCERTED ACTIVITY OF BOYCOTTS,**
13 **BANNERS, STRIKES, WALKOUTS AND OTHER ACTIVITIES**

14 The ALJ did not address this issue.

15 The FUAP is invalid because it makes it clear that the employees are limited to the
16 arbitration procedure to resolve disputes. It applies to “all disputes that may arise out of or be
17 related in any way to my employment” not just disputes that could be brought in a court or before
18 any agency. It governs “all disputes which may arise out of the employment context.” This
19 would foreclose the employees from engaging in strikes or boycotting activity, expressive activity
20 or other public pressure campaigns. This is a yellow dog contract. Here, employees are forced to
21 agree that they shall use only the arbitration procedure to resolve disputes with the employer, and
22 thus they would be violating the arbitration procedure if they were to use another more effective
23 forum, such as a public protest or a strike.²⁹ It prohibits all forms of concerted activity because it
24 requires that employees use the arbitration procedure. Any employee who violates this rule
25 would be subject to discipline just as he/she would be for violating any other employer rule. This
26 is a fundamentally illegal forced waiver of the Section 7 right to engage in lawful economic

27 ²⁹ The reference in paragraph 4 that an employee will “not be subject to disciplinary action of any kind for
28 opposing the arbitration provisions of this Agreement” doesn’t suggest that the employee won’t be
disciplined for string or taking other economic action rather than submitting the dispute to arbitration.

1 activity, including boycotting, picketing, striking, leafleting, bannerling and other expressive
2 activity. That language is contained in the FUAP.³⁰

3 That concerted activity could certainly include seeking a Union's assistance in negotiating
4 a better arbitration provision or in invoking the FUAP. Fundamentally, it also would make it
5 unlawful to engage in Union activities such as a strike, picketing, bannerling or other concerted
6 activity. The Board's recognition that the FUAP is an unlawful yellow dog contract under the
7 Norris-LaGuardia Act, reaffirms that but does not go far enough. If the FUAP is unlawful under
8 the Norris-LaGuardia Act and Section 7, it is unlawful because it prohibits other concerted means
9 of resolving disputes. Employees are not limited to bringing claims concertedly before courts or
10 agencies.³¹ They can do so by direct action.³²

11 The FUAP is an unlawfully imposed no-strike, no boycott, no bannerling, no leafleting and
12 no concerted activity ban. It is the worst form of a yellow dog contract.

13 **XI. THE FUAP UNLAWFULLY PROHIBITS JOINT ACTION**

14 The ALJ did not address this issue.

15 This FUAP has the specific reference to prohibiting "consolidation or joinder." This
16 undefined ambiguous term would prohibit even one employee from acting jointly with another
17 employee to help each other bring individual claims. It would prohibit them from referring to
18 other claims or invoking the doctrine of *res judicata* or *collateral estoppel*. To the extent it is
19 ambiguous; it must be construed against the employer.

20 It would prohibit employees from jointly asking a supervisor to resolve disputes since
21 purportedly covers "all disputes that may arise out of or be related in any way to may
22

23 ³⁰ The attempted exculpation in Paragraph 4 similarly does not save the provision. The board has rejected
24 the proposition that similarly worded phrases which contain the language of the statute do not save
overbroad provisions. They serve more to create confusion.

25 ³¹ Surely every employer would rather force employees to resolve disputes in the least friendly fora: the
26 courts and arbitration. The Norris-LaGuardia Act and the NLRA protect the right of employees to settle
disputes in the most effective manner: collective action in the streets. See, *On Assignment Staffing*
Services, 362 NLRB No 189 (2015).

27 ³² See below where we address the need to overrule *Lutheran Heritage-Village Livonia*, 343 NLRB 824
28 (1998). Under current Board law however this ambiguity should be construed against the employer. See
Murphy Oil, supra, at *26 and other cases cited below.

1 employment. In effect the FUAP if enforceable prohibits all open door policies but for this case
2 would prohibit any joint efforts by employees to resolve disputes without any formal
3 procedures.³³

4 **XII. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT SALTING AND**
5 **APPLIES AFTER EMPLOYMENT ENDS**

6 The ALJ did not address this issue.

7 The FUAP would extend to someone who became employed for the purpose of salting,
8 improving working conditions and organizing since it would restrict his/her right to engage in
9 concerted activity and organize. It would prohibit the salt from assisting other employees in
10 pursuing collective claims. Moreover, the FUAP purports to govern even after an employee quits
11 or is fired. If the employee chooses to quit because of miserable working conditions or to
12 organize, she is barred from acting collectively. Respondent cannot bar an employee who has
13 terminated any employment agreement from acting collectively on behalf of either current
14 employees or other former employees.³⁴

15 **XIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS**
16 **BECAUSE IT FORECLOSES GROUP CLAIMS BROUGHT BY A UNION AS A**
17 **REPRESENTATIVE OF AN EMPLOYEE OR EMPLOYEES**

18 The ALJ did not address this issue.

19 The FUAP prohibits a union that represents an unrepresented employee from representing
20 that employee in the arbitration procedure. That is, it would prohibit a union from acting on
21 behalf of an employee, not as the collective representative of the group, but rather as the
22 representative of the individual employee. It would also prevent a union from acting as the
23 minority representative or members-only representative of an employee or group of employees.

24 Such activity is protected. It would prevent a union from acting on behalf of a group of
25 employees.

26 The FUAP prohibits a union that is recognized or certified from representing employees.

27 The FUAP would prevent a union, as the representative of its members, or non-labor

28 ³³ The resolution of this issue will fact the scope of the relief and the notice.

³⁴ California prohibits non-compete clauses. This would conflict with such provisions.

1 organization worker center from representing its members where authorized under state or federal
2 law. See *Soc. Servs. Union, Local 535 v. Santa Clara Cty.*, 609 F.2d 944 (9th Cir. 1979) (Union
3 may act as representative of its members in class action); *United Food & Commercial Workers*
4 *Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996) (union has associational standing on
5 behalf of its members); *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102
6 F.R.D. 457 (N.D. Cal. 1983); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of*
7 *Am. v. Brock*, 477 U.S. 274 (1986).³⁵ See *Brotherhood of Teamsters v Unemployment Insurance*
8 *Appeals Board*, 190 Cal. App 3d 1517 (1987)(California law allows union to have standing on
9 behalf of its members)³⁶

10 **XIV. THE FUAP IS UNLAWFUL BECAUSE IT IMPOSES ADDITIONAL COSTS ON**
11 **EMPLOYEES TO BRING EMPLOYMENT RELATED DISPUTES**

12 The ALJ did not address this issue.

13 This FUAP contains a fundamental flaw in that it would require an employee to pay
14 arbitration costs. Thus, it necessarily increases the costs to employees who bring claims
15 concerning working conditions. This is particularly a flaw in California, where the Berman
16 Hearing process is free to an employee. See Labor Code § 98 Thus if one employee sought to
17 bring an issue to the Labor Commissioner on behalf of others, that employee would incur no
18 costs. The same claim brought in arbitration would incur the arbitration costs of at least the
19 arbitrator and other associated costs. In effect, a penalty is imposed on the employee because he
20 or she has to pay the arbitration costs where there is a free procedure under the Labor
21 Commissioner system under Labor Code § 98.³⁷ The Act does not permit an employer from
22 forcing employees to pay anything, not one cent, to exercise their section 7 rights. Because
23

24 ³⁵ It would prohibit an employee from joining a non-labor organization that brought litigation against the
25 employer on issues affecting working conditions. An employee could not join a worker center, for
26 example, that brought claims by other employees.

26 ³⁶ The California Labor expressly allows representatives such as union to raise claims. See Labor Code
27 Section, 1198.5(b)(1).

27 ³⁷ The agreement purports to waive the procedure of the California Code of Civil Procedure to vacate
28 arbitration awards. See Paragraph 6. A Second arbitration cost would impose further costs on the
employee.

1 employees can bring concerted claims without cost to the Labor Commissioner, the FUAP is
2 unlawful

3 Furthermore, employees cannot share expert witness fees, deposition costs, copying costs,
4 attorney's fees and many other costs associated with bringing and pursuing claims. Bringing
5 them as a group includes sharing those costs. Sharing costs is concerted activity. Thus, the
6 FUAP expressly penalizes workers by increasing their costs in violation of Section 7.

7 The FUAP would prevent a federally recognized Joint Labor Management Committee
8 from pursuing claims. See 29 U.S.C. § 175a.³⁸

9 On all these grounds, the FUAP is unlawful.

10 **XV. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT AN EMPLOYEE**
11 **OF ANOTHER EMPLOYER FROM ASSISTING AN EMPLOYEE OF**
12 **RESPONDENT OR JOINING WITH AN EMPLOYEE OF RESPONDENT TO**
13 **BRING A CLAIM**

14 The ALJ did not address this issue.

15 Separately, an employee of any other employer is also an employee within the meaning of
16 the Act. *Eastex v. NLRB*, 437 U.S. 556 (1978). Such other employee could assist an employee of
17 Respondent or join with a claim brought by an employee of Respondent. The rights of all other
18 employees of other employers are violated by the FUAP independently of whether it violates just
19 the Section 7 rights of Respondent's employees. The FUAP cannot apply to an employee of
20 another employer, nor can it prohibit an employee of Respondent from joining with an employee
21 of another employer.

22 Furthermore, it would prohibit employees of Respondent from bring group complaints
23 with employees of "its owners, directors, officers, managers, employees, or agents" described in
24 the FUAP even though those "affiliates, subsidiaries, officers, directors, agents, attorneys,
25 representative and/or other employees" are not parties to the FUAP.³⁹

26 ³⁸ It is not contradictory to refer to the rights under federal statutes and raise the question of commerce
27 jurisdiction with respect to the FAA. The difference is that the FAA regulates dispute resolution or the
28 employment dispute, not the business or commerce activity of the employer.

³⁹ It is not "mutual" and is invalid for this reason.

1 **XVI. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS**
2 **BECAUSE IT APPLIES TO PARTIES WHO ARE NOT THE EMPLOYER BUT**
3 **MAY BE AGENTS OF THE EMPLOYER OR EMPLOYERS OF OTHER**
4 **EMPLOYEES UNDER THE ACT**

5 The ALJ did not address this issue.

6 The FUAP is invalid because it applies to other employers. The FUAP extends to
7 disputes with the Company, or “its owners, directors, officers, managers, employees, or agents.”
8 None of them is bound to arbitrate claims against the employee except the Company itself.⁴⁰ It
9 does not bind its “owners, directors, officers, managers, employees, agents and parties affiliated
10 with its employee benefit and health plans” and so on. Each of these persons could be an
11 employer or joint employer within the meaning of the Act. Yet, the employee is bound to
12 arbitrate claims against those individuals where those claims arise out of wages, hours and
13 working conditions to the extent they are the employer.

14 There are many wage and hour statutes, including the Fair Labor Standards Act, the
15 California Fair Employment and Housing Act and provisions of the Labor Code, that can impose
16 joint liability.⁴¹ Thus, the FUAP prohibits Section 7 activity against parties who are not the
17 employer and thus is overbroad and invalid. This would affect the employees’ right to bring
18 claims against joint employer relationships. See *Browning-Ferris Indus.*, 362 NLRB No. 186
19 (2015).

20 Moreover, there is no contract between any employee and these third parties, at least
21 agents. So the FAA cannot apply. The FUAP cannot apply to non-parties to any agreement with
22 the employees. *First Options v. Kaplan*, 514 U.S. 938 (1995). The same is true under state law.
23 *Matthau v. Superior Court*, 151 Cal.App.4th 593, 598 (2007).

24 **XVII. THE FUAP VIOLATES ERISA**

25 The ALJ did not address this issue.

26 The FUAP violates ERISA. Because it extends to any dispute this would include disputes

27 ⁴⁰ If the opt-out provision has been invoked then this is not binding on those employees.

28 ⁴¹ In addition, this effort to limit claims against benefit plans is prohibited by ERISA, 29 U.S.C. § 1140,
since it interferes with the rights of employees to bring claims against benefit plans.

1 over benefit plans and this runs contrary to the Department of Labor regulation prohibiting
2 mandatory arbitration. See 29 C.F.R. § 2560.503-1(c)(4); see *Snyder v. Federal Insurance Co.*,
3 2009 WL 700708 (S.D. Ohio 2009) (denying arbitration relying on the DOL regulation). We
4 recognize that a plan may require exhaustion of its remedies including arbitration, but that's only
5 a function of exhausting the plan arbitration clause prior to bring a court action. See *Chappell v.*
6 *Laboratory Corporation America*, 232 F.3d 719 (2000); see also *Engleson v. Unum Life*
7 *Insurance Co.*, 723 F.3d 611 (6th Cir. 2003); see also 29 U.S.C. § 1133.

8 Additionally, this language violates the right of employees to invoke procedures under the
9 employee benefit plans, rather than under this FUAP.⁴² ERISA requires that there be an
10 arbitration procedure to bring claims against benefit plans. This effectively preempts ERISA by
11 requiring employees to use this procedure rather than the procedure adopted by the benefit plans.
12 See 29 U.S.C. § 1133.

13 **XVIII. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS**
14 **BECAUSE IT RESTRICTS THE RIGHT OF WORKERS TO ACT TOGETHER**
15 **TO DEFEND CLAIMS BY THE EMPLOYER AGAINST THEM**

16 The ALJ did not address this issue.

17 Employees have the right to band together to defend against claims made by the Employer
18 or other employees. Although an employee might choose to refrain from concerted activity
19 against the employer, that employee may wish to engage in joint activity where there are joint or
20 related claims against several employees.

21 The FUAP imposes a very heavy burden on employees who may be jointly the subject of
22 a claim by the company against them. Under the FUAP, they could not jointly defend themselves
23 but would have to defend themselves individually in separate actions. The employer may have
24 claims against multiple employees, such as overpayments for wages or breach of confidentiality
25 provisions. There may be cross-claims, counter-claims, interpleader or claims for
26 indemnification. There may be claims for declaratory relief against the employer or other
27 employees. The employees are entitled to defend such claims or pursue such claims jointly and

28 ⁴² Respondent by imposing this arbitration requirement has become the administrator of the plans and a
fiduciary to the plans.

1 concertedly.⁴³ The FUAP is facially invalid since it prohibits group action to defend against
2 claims jointly.⁴⁴

3 **XIX. THE FUAP IS UNLAWFUL UNDER THE NORRIS-LAGUARDIA ACT**

4 The ALJ did not address this issue.

5 The Norris-LaGuardia Act, 29 U.S.C. § 101 et seq., states that, as a matter of public
6 policy, employees “shall be free from the interference, restraint, or coercion of employers of
7 labor, or their agents, in the designation of . . . representatives [of their own choosing] or in self-
8 organization or in other concerted activities for the purpose of collective bargaining or other
9 mutual aid or protection.”⁴⁵ 29 U.S.C. § 102 (emphasis added). The Act declares that any
10 “undertaking or promise in conflict with the public policy declared in section 102 . . . shall not be
11 enforceable in any court of the United States.” 29 U.S.C. § 103. The FUAP plainly interferes
12 with the rights guaranteed by this federal law. The FAA does not eliminate the rights guaranteed
13 by the Norris-LaGuardia Act. This argument is fully explored in the law review article written by
14 Professor Matthew Finkin, “The Meaning and Contemporary Vitality of the Norris-LaGuardia
15 Act,” 93 Neb L. Rev 1 (2014). He forcefully argues that an agreement to waive collective actions
16 is a quintessential yellow dog contract prohibited by the Norris-LaGuardia Act. We repeat this
17 here to reinforce our arguments. See *On Assignment Staffing, supra*.

18 **XX. THE MAINTENANCE OF RULES PROHIBITING CONCERTED ACTIVITY**
19 **CONCERNING THE FUAP MAKES IT UNLAWFUL**

20 The ALJ did not address this issue.

21 The complaint alleged the maintenance of unlawful rules. One of those rules is alleged in
22 paragraph 5(d) and (e):

23
24 ⁴³ The FUAP specifically prohibits “consolidation or joinder of other claims or controversies.” This
would be a useful procedure for employees to concertedly defend claims.

25 ⁴⁴ For example, employees would have to hire lawyers who would cost more for individual representation.
26 Employees could not share the costs of expert witnesses, document production, depositions etc. The
27 simple fact that individual actions increase the costs on the workers makes it a penalty and violates Section
7.

28 ⁴⁵ The Commerce standard for the Norris-LaGuardia Act is much broader than the “transactional”
standard of the FAA. See 29 U.S. C. Section 113 (defining broadly labor dispute).

1 E-Mail, facsimile machines, voice mail may not be used to
2 advertise or solicit employees.

3 No information shall be given regarding any employee by any other
4 employee or manager to an outside source.

5 These rules have been maintained at all times relevant to this matter. Although the
6 Company has now settled and agreed to rescind those rules, nonetheless, they were applicable
7 during the period when the FUAP was forced upon the employees.⁴⁶

8 Each of these rules restricts concerted activity by employees in bringing either their own
9 claim on behalf of others or in relation to others, or group claims. For example, e-mail can be a
10 useful source to communicate with others about workplace issues. Under *Purple*
11 *Communications*, 361 NLRB No. 126 (2014), employees have the right to engage in that activity,
12 certainly on non-work time. We assert they have that right during work time, but that distinction
13 is irrelevant. Employees are prohibited from using e-mail for any purpose to “solicit employees.”
14 This would limit employees from soliciting other employees for assistance or for similar claims.

15 Similarly, the rule prohibiting the disclosure of any information would prohibit an
16 employee from disclosing that information to an attorney, an outside representative or anyone
17 else who might assist her in pursuing a claim.⁴⁷

18 These rules thus render the FUAP effectively useless. The ALJ should further find that
19 the maintenance of unlawful rules which interfere with the FUAP renders it unlawful. The Board
20 has held that where the FUAP itself contains unlawful rules or unlawful provisions, those
21 provisions are invalid and the FUAP itself is invalid. See *Century Fast Foods, Inc.*, 363 NLRB
22 No. 97 (2016). (Confidentiality will invalidate FUAP.)

23 **XXI. THE FUAP IS INVALID BECAUSE IT IS UNCLEAR AS TO WHAT IT COVERS,**
24 **AND THEREFORE IT IS OVERBROAD; THE DECISION IN LUTHERAN**
25 **HERITAGE VILLAGE-LIVONIA SHOULD BE OVERRULED; THE BOARD HAS**
26 **NOW EFFECTIVELY OVERRULED LUTHERAN HERITAGE VILLAGE-**
27 **LIVONIA AND SHOULD EXPRESSLY DO SO**

28 The ALJ did not address this issue.

⁴⁶ The Charging Party has objected to the settlement and that appeal is pending before the General Counsel.

⁴⁷ There is no record evidence any portion of the case was resolved. See note 1. In fact the Office of the General Counsel rejected in part the settlement.

1 **A. INTRODUCTION**

2 The FUAP is ambiguous as to what it covers. For example, one disputed area is whether
3 this would encompass claims before the Labor Commissioner under California Labor Code § 98.
4 Although the FUAP does not preclude an employee administrative charges before two agencies
5 other than the NLRB it forecloses such claims in court.⁴⁸ This is exactly the question faced by
6 the California Supreme Court in *Sonic-Calabassas, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert*
7 *denied* 134 S. Ct 2724 (2014). It is not clear whether that important procedure under California
8 law is included or excluded.

9 Recently, the Board has reemphasized that, where language “creates an ambiguity,” that
10 ambiguity “must be construed against the Respondent as the drafter of the [rule].” *Murphy Oil*
11 *U.S.A., Inc.*, 361 NLRB No. 72 at *26 (2014). *Professional Janitorial Serv., supra*, at n. 8, and
12 *Caesars Entertainment*, 362 NLRB No. 190 at *1 (2015). The Board relied upon its prior
13 decision in *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir.
14 1999) in reaching this conclusion. Thus, since the FUAP is unclear, it should be construed
15 against the company to prohibit all forms of concerted activity and thus is overbroad.
16 Additionally, this case illustrates precisely why the Board’s decision in *Lutheran Heritage*
17 *Village-Livonia*, 343 NLRB 646 (2004), should be overruled.

18 **B. THE BOARD SHOULD DISCARD LUTHERAN HERITAGE VILLAGE-**
19 **LIVONIA TO THE TRASH HEAP OF DISCREDITED DECISIONS**

20 The Board should return to the rule established in *Lafayette Park Hotel*, 326 NLRB 824
21 (1998). The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an
22 unworkable and unreasonable doctrine for evaluating when employer-maintained rules are
23 unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB
24 824 (1998). See also *Ark Las Vegas Rest. Corp.*, 343 NLRB 1281, 1283 (2004) (any ambiguity in
25 a rule that restricts concerted activity can be construed against the employer).

26 The Board’s application of the *Lutheran Heritage Village-Livonia* rule ignores the basic

27 _____
28 ⁴⁸ It would prevent a concerted charge brought by two employees or by one employee on behalf of a group
since it uses the word “me.”

1 concept that if some employees can read the language as interfering with Section 7 rights, then
2 there is a violation because some employees have had their rights unlawfully interfered with or
3 restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity
4 allows employers to chill the Section 7 rights of those who reasonably read the rule as reaching
5 Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest
6 in such activity. They may assert their right to “refrain from such activity.” But those who
7 choose to engage in such activity have their conduct chilled, if not prohibited. The Board’s rule
8 is a form of tyranny of some or a few over the rights of those who want to engage in Section 7
9 activity. If an employer’s action interferes with the Section 7 rights of one employee, the
10 conduct violates the Act. The *Lutheran Heritage Village-Livonia* rule assumes that conduct
11 violates the Act only if many, and probably a majority, would have their rights violated. Such a
12 rule should be discarded and thrown into the trash pile of discredited doctrines.

13 In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

14 Where, as here, the rule does not refer to Section 7 activity, we will not
15 conclude that a reasonable employee would read the rule to apply to such
16 activity simply because the rule *could* be interpreted that way. To take a
17 different analytical approach would require the Board to find a violation
whenever the rule could conceivably be read to cover Section 7 activity, even
though that reading is unreasonable. We decline to take that approach.

18 *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

19 This doctrine has created confusion and uncertainty in the application of rules. Moreover,
20 it is an illogical statement. If the “rule could be interpreted that way [to prohibit Section 7
21 activity],” the rule should be unlawful. We are not suggesting that if that “reading is
22 unreasonable,” it should violate the Act. Only if the rule can be reasonably read to interfere with
23 Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is
24 ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity,
25 it should be unlawful. Here, this is heightened by the fact that, as illustrated above, the
26 Employer’s Chief Executive Officer cannot explain the scope of the FUAP. If he can’t do so, no
27 employee can easily construe it. In fact, we believe that in most cases, if you ask the president of
28 the company to explain their corporate rules, they can’t explain how they would apply in most

1 common circumstances where Section 7 rights are at issue. This case incisively illustrates why
2 *Lutheran Heritage Village-Livonia* should be overruled.

3 The Board's prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity
4 against the employer. This has been the consistent application in many areas of law, including
5 the Board's application of employer-created rules. After all, the employer has control over what
6 it says, and it can implement language that is not vague or ambiguous. This is inherently true of
7 most employer rules, but quite clear in this case. Only the employer benefits from chilling and
8 restricting Section 7 activity. Recently, the Board seemed to have made it plain in *Murphy Oil*,
9 *supra*, where there is an ambiguity it would be construed against the Employer.

10 A worker is not at fault if the employer makes a statement that is ambiguous and could
11 affect or chill Section 7 rights. The employer statement should be construed against the
12 employer. Where there is any reasonable interpretation of the rule that could interfere with
13 Section 7 activity, the rule should be deemed unlawful. Employers will necessarily make rules
14 ambiguous to chill such activity unless required to make them clear. Ambiguity gives them wider
15 discretion and more power. Such ambiguities necessarily coerce some employees.

16 This interpretation has become one by which the Board ignores the illegal yet reasonable
17 interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has
18 turned the law on its head; where there is a reasonable interpretation that the rule does not affect
19 Section 7 rights, which only a few employees may apply, it makes no difference that most or
20 many of the employees would apply a reasonable interpretation that the rule prohibits Section 7
21 activity.

22 Put in other words, the burden should be on the drafter and maintainer of a rule to prove
23 that "no employee," not a single one, "would reasonably construe" the rule in a way to cover or
24 limit Section 7 activity. If any employee could reasonably construe the rule as limiting Section 7
25 activity, it would be unlawful.⁴⁹

26 This is further illustrated by the Board's recent decision in *Three D, LLC d/b/a Triple Play*
27

28 ⁴⁹ The reverse is true, language prohibiting employees from refraining to participate would be unlawful.

1 *Sports Bar & Grille*, 361 NLRB No. 31 (2014). The majority found the “term ‘inappropriate’ to
2 be ‘sufficiently imprecise’ that employees would reasonably understand it to encompass
3 ‘discussion and interactions protected by Section 7.’” Slip Opinion p. 7. This is almost a
4 formulation that where there is an ambiguity in a phrase or rule it should be construed against the
5 drafter and enforcer of the rule, namely the employer. This contradicts, to some degree, the later
6 statement that “many Board decisions [] have found a rule unlawful if employees would
7 reasonably interpret it to prohibit protected activities.” Slip Opinion p. 8. The word “would”
8 should be replaced with the word “could.” This would shift the burden to the employer to clarify
9 its rules to eliminate interference with Section 7 rights.

10 Recently, the Board has also made it clear that where language “creates an ambiguity,”
11 that ambiguity “must be construed against the Respondent as the drafter of the [rule].” *Murphy*
12 *Oil U.S.A., Inc.*, 361 NLRB No. 72 at *19 (2014). The Board relied upon its prior decision in
13 *Lafayette Park Hotel*, 326 NLRB No. 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).
14 Here, there are patent ambiguities in the FUAP and the policies governing the FUAP. Thus, there
15 is an ambiguity created that must be construed in light of *Murphy Oil* against the drafter of the
16 rules, namely the employer. Under these circumstances, this is the perfect case in which to
17 overrule *Lutheran Heritage Village-Livonia*. It is particularly an appropriate case in which to
18 overrule that doctrine because the employer couldn’t explain the rules. If the employer can’t
19 explain the rules, no employee could be expected to understand what position or conduct is
20 prohibited or permitted.

21 The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of
22 employer rules to be created from the employer perspective rather than from the view of a
23 worker. Where the worker could read any reasonable interpretation into the rule that would
24 prohibit Section 7 activity, it is overbroad as to that worker or a group of workers. The fact that
25 some workers might reasonably construe it not to prohibit such Section 7 activity does not
26 invalidate the fact that at least some employees could reasonably read the rule to prohibit Section
27 7 activity, and thus the rule would chill those activities. Where one employee understands the
28 rule to prohibit Section 7 protected activity, at least an interference with Section 7 activity has

1 been created.

2 We quote at length the dissent, and we will ask this Board to return to the view of the
3 dissent:

4 In *Lafayette Park Hotel*, *supra* at 825, the Board recognized that determining
5 the lawfulness of an employer's work rules requires balancing competing
6 interests. The Board thus relied upon the Supreme Court's view, as stated in
7 *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945), that the inquiry
8 involves "working out an adjustment between the undisputed right of self-
9 organization assured to employees under the Wagner Act and the equally
10 undisputed right of employers to maintain discipline in their establishments."
11 326 NLRB at 825. While purporting to apply the Board's test in *Lafayette
12 Park Hotel*, the majority loses sight of this fundamental precept. Ignoring the
13 employees' side of the balance, the majority concludes that the rules
14 challenged here are lawful solely because it finds that they are clearly
15 intended to maintain order in the workplace and avoid employer liability. The
16 majority's incomplete analysis belies the objective nature of the appropriate
17 inquiry: "whether the rules would reasonably tend to chill employees in the
18 exercise of their Section 7 rights."

19 Our colleagues properly acknowledge that even if a "rule does not explicitly
20 restrict activity protected by Section 7," it will still violate Section 8(a)(1) if—
21 among other, alternative possibilities—"employees would reasonably construe
22 the language to prohibit Section 7 activity." On this point, of course, the
23 established test does not require that the only reasonable interpretation of the
24 rule is that it prohibits Section 7 activity. To the extent that the majority
25 implies otherwise, it errs. Such an approach would permit Section 7 rights to
26 be chilled, as long as an employer's rule could reasonably be read as lawful.
27 This is not how the Board applies Section 8(a)(1). See, e.g., *Double D
28 Construction Group, Inc.*, 339 NLRB 303, 304 (2003) ("The test of whether a
statement is unlawful is whether the words could reasonably be construed as
coercive, whether or not that is the only reasonable construction").

The majority asserts that it has considered the employees' side of the balance,
in that it has found that the purpose behind the Respondent's rules—to
maintain order and protect itself from liability—is so clear that it will be
apparent to employees and thus could not reasonably be misunderstood as
interfering with Section 7 activity. Although the Respondent's asserted pure
motive in creating such rules may be crystal clear to our colleagues, it may not
be as obvious to the Respondent's employees, especially in light of the other
unlawful rules maintained by the Respondent. Rather, for reasons explained
below, we find that the challenged rules are facially ambiguous. The Board
construes such ambiguity against the promulgator. *Norris/O'Bannon*, 307
NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 299 fn. 8 (1978).

24 *Id.* at 650 (footnote omitted).

25 This reasoning was correct then and governs now.

26 **C. THE BOARD HAS EFFECTIVELY OVERRULED *LUTHERAN HERITAGE***
27 ***VILLAGE-LIVONIA* BY APPLYING THE RULE OF CONSTRUING**
28 **AMBIGUITIES AGAINST THE EMPLOYER**

The Board has already effectively overruled *Lutheran Heritage Village-Livonia*. It has in

1 recent cases made it clear that “[w]here employees would reasonably read an ambiguous rule to
2 restrict their Section 7 rights, the Board construes the ambiguity in the rule against the rule’s
3 promulgator. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.*, 203 F.3d 52 (D.C.
4 Cir. 1999). *Professional Janitorial Serv.*, 363 NLRB No. 35, n.8 (2015), *Murphy Oil USA*, *supra*,
5 and *Caesars Entertainment*, *supra*. *Lutheran Heritage Village-Livonia* cannot survive the logic.
6 Once there is an ambiguity, some employees will construe the rule to prohibit Section 7 activity.
7 It is then inconsistent to hold that when the hypothetical employee who is deemed reasonable
8 (meaning the NLRB) reads it one way, the Board ignores the other reasonable employees who
9 read the rule to proscribe Section 7 activity. In effect, the Board has overruled *Lutheran Heritage*
10 *Village-Livonia*, and it should now so state.

11 **D. CONCLUSION**

12 In summary, *Lutheran Heritage Village-Livonia* should be expressly overruled.
13 Alternatively the Board should concede that it has effectively done so.

14 **XXII. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO THE CORE** 15 **RELIGIOUS ACTIVITY OF HELPING OTHER WORKERS, AND THE FAA,** 16 **NLRA AND NORRIS-LAGUARDIA ACT HAVE TO BE APPLIED TO PROTECT** 17 **THIS RELIGIOUS RIGHT**

18 The ALJ did not address this issue.

19 Section 7 protects the right of employees to engage in concerted protected activity. That
20 extends to asking for help in work place issues from other employees. *Fresh & Easy*
21 *Neighborhood Market*, 361 NLRB No. 12 (2014). Such concerted activity is a central principle
22 of religion, including any brand of religion that the employer professes in the work place. Section
23 7 activity is a core religious activity. The solidarity principle drawn from this case is the essence
24 of religion. Protected concerted activity for mutual aid and protection is core religious activity.

25 In 1993, Congress enacted the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb–
26 2000bb-4. It was enacted in response to a Supreme Court decision, *Employment Division v.*
27 *Smith*, 494 U.S. 872 (1990), which many saw as restricting the exercise of religion.

28 The Act in relevant part provides:

(a) In general

1 Government shall not substantially burden a person's exercise of religion even
2 if the burden results from a rule of general applicability, except as provided in
subsubsection (b) of this section.

3 (b) Exception

4 Government may substantially burden a person's exercise of religion only if it
5 demonstrates that application of the burden to the person--

6 (1) is in furtherance of a compelling governmental interest; and

7 (2) is the least restrictive means of furthering that compelling governmental
interest.

8 (c) Judicial relief

9 A person whose religious exercise has been burdened in violation of this
10 section may assert that violation as a claim or defense in a judicial proceeding
11 and obtain appropriate relief against a government. Standing to assert a claim
or defense under this section shall be governed by the general rules of
standing under article III of the Constitution.

12 The statute does not apply to state government. See, *City of Boerne v. P. F. Flores*, 521
13 U.S. 507 (1997).⁵⁰

14 The RFRA has been the subject of litigation. It, however, came boldly to the attention of
15 the public in *Burwell v. Hobby Lobby Stores, Inc.*, *supra*.

16 Hobby Lobby operates according to “Christian” principles;
17 Hobby Lobby's statement of purpose commits the Greens to “[h]onoring the
Lord in all [they] do by operating the company in a manner consistent with
18 Biblical principles.” App. in No. 13–354, pp. 134–135 (complaint). Each
family member has signed a pledge to run the businesses in accordance with
19 the family's religious beliefs and to use the family assets to support Christian
ministries. 723 F.3d, at 1122. In accordance with those commitments, Hobby
20 Lobby and Mardel stores close on Sundays, even though the Greens calculate
that they lose millions in sales annually by doing so. *Id.*, at 1122; App. in No.
13–354, at 136–137.

21 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct.2751, 2766 (2014).

22 Moreover, the Court noted:

23 Even if we were to reach this argument, we would find it unpersuasive. As an
24 initial matter, it entirely ignores the fact that the Hahns and Greens[owners of
Hobby Lobby] and their companies have religious reasons for providing
25 health-insurance coverage for their employees. Before the advent of ACA,
they were not legally compelled to provide insurance, but they nevertheless
26 did so—in part, no doubt, for conventional business reasons, but also in part
because their religious beliefs govern their relations with their employees.

27 ⁵⁰ Congress subsequently amended the RFRA to apply, in part, to certain state actions. See Religious
28 Land Use and Institutionalized Persons Act of 2000, 42. U.S.C. § 2000cc, *et seq.*

1 See, App. to Pet. for Cert. in No. 13–356, p. 11g; App. in No. 13–354, at 139.
2 *Id.*

3 The Supreme Court in *Burwell* held that the application of a portion of the Affordable
4 Care Act imposes substantial burden on the religious beliefs of the owners of Hobby Lobby. It
5 did so because there was a regulation requiring that contraceptives be provided over the religious
6 objections of the owners. The Court held that this “contraceptive mandate imposes a substantial
7 burden on the exercise of religion.” *Id.* at 2779.

8 The Court then went on to state:

9 The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the
10 “Government [from] substantially burden[ing] a person's exercise of religion
11 even if the burden results from a rule of general applicability” unless the
12 Government “demonstrates that application of the burden to the person—(1) is
13 in furtherance of a compelling governmental interest; and (2) is the least
14 restrictive means of furthering that compelling governmental interest.” 42
15 U.S.C. §§ 2000bb–1(a), (b). As amended by the Religious Land Use and
16 Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers “any exercise
17 of religion, whether or not compelled by, or central to, a system of religious
18 belief.” § 2000cc–5(7)(A).

19 *Id.* at 2754.

20 Recently, the Tenth Circuit described the application of the RFRA:

21 Most religious liberty claimants allege that a generally applicable law or
22 policy without a religious exception burdens religious exercise, and they ask
23 courts to strike down the law or policy or excuse them from compliance. Our
24 circuit's three most recent RFRA cases fall into this category. In *Hobby Lobby
25 Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir.2013) (en banc), *aff'd sub*
26 *nom. Hobby Lobby*, — U.S. —, 134 S.Ct. 2751, 189 L.Ed.2d 675, the
27 ACA required the plaintiffs to provide their employees with health insurance
28 coverage of contraceptives against their religious beliefs. In *Yellowbear v.
Lampert*, 741 F.3d 48 (10th Cir.2014), a prison policy denied the plaintiff
access to a sweat lodge, where he wished to exercise his Native American
religion. In *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir.2010), a prison
policy denied the plaintiff a halal diet, which is necessary to his Muslim
religious exercise. In each instance, the law or policy failed to provide an
exemption or accommodation to the plaintiff(s).

29 The Supreme Court's recent ruling in *Holt v. Hobbs*, 135 S.Ct. 853, 2015 WL
30 232143 (2015), which concerned a prison ban on inmates' growing beards, is
31 another recent example of the more common RFRA claim. The plaintiff in
32 *Holt* sought to grow a beard in accordance with his Muslim faith. In *Holt*, like
33 in *Hobby Lobby*, the government defendants insisted on a complete restriction
34 and did not attempt to accommodate the plaintiff's religious exercise. The
35 plaintiff in *Holt* proposed a compromise—he would be allowed to grow only a
36 half-inch beard—which the prison refused. 135 S.Ct. at 861. The Court
37 ultimately approved this compromise in its ruling. *Id.* at 867.

1 *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1170-1171
2 (10th Cir.) *cert. granted sub nom. S. Nazarene Univ. v. Burwell*, 136 S. Ct. 445 (2015) *and cert.*
3 *granted in part sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colorado v.*
4 *Burwell*, 136 S. Ct. 446 (2015).

5 That Court when on to explain in some detail the RFRA application:

6 RFRA was enacted in 1993 in response to *Employment Division, Department*
7 *of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108
8 L.Ed.2d 876 (1990), in which the Supreme Court held that burdens on
9 religious exercise are constitutional under the Free Exercise Clause if they
10 result from a neutral law of general application and have a rational basis. *Id.* at
11 878–80; *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir.2002).
12 Congress enacted RFRA to restore the pre-*Smith* standard, which permitted
13 legal burdens on an individual's religious exercise only if the government
14 could show a compelling need to apply the law to that person and that the law
15 did so in the least restrictive way. *Smith*, 494 U.S. at 882–84; *see also Hobby*
16 *Lobby*, 134 S.Ct. at 2792–93 (Ginsburg, J., dissenting). Congress specified the
17 purpose of RFRA was to restore this compelling interest test as it had been
18 recognized in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d
19 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d
20 15 (1972). *See* 42 U.S.C. § 2000bb(b)(1).

21 By restoring the pre-*Smith* compelling interest standard, Congress did not
22 express any intent to alter other aspects of Free Exercise jurisprudence. *See*
23 *id.*; *Hobby Lobby*, 723 F.3d at 1133 (“Congress, through RFRA, intended to
24 bring Free Exercise jurisprudence back to the test established before *Smith*.
25 There is no indication Congress meant to alter any other aspect of pre-*Smith*
26 jurisprudence....”). Notably, pre-*Smith* jurisprudence allowed the government
27 “wide latitude” to administer large administrative programs, and rejected the
28 imposition of strict scrutiny in that context. As the Supreme Court indicated in
Bowen v. Roy,

In the enforcement of a facially neutral and uniformly applicable
requirement for the administration of welfare programs reaching
many millions of people, the Government is entitled to wide
latitude. The Government should not be put to the strict test
applied by the District Court; that standard required the
Government to justify enforcement of the use of Social Security
number requirement as the least restrictive means of accomplishing
a compelling state interest.

476 U.S. 693, 707, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986). As we discuss at
greater length below, the pre-*Smith* standards restored by RFRA permitted the
Government to impose *de minimis* administrative burdens on religious actors
without running afoul of religious liberty guarantees.

3. Elements of RFRA Analysis

RFRA analysis follows a burden-shifting framework. “[A] plaintiff establishes
a *prima facie* claim under RFRA by proving the following three elements: (1)
a substantial burden imposed by the federal government on a(2) sincere (3)

1 exercise of religion.” *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir.2001);
2 see 42 U.S.C. § 2000bb–1(a). The burden then shifts to the government to
3 demonstrate its law or policy advances “a compelling interest implemented
4 through the least restrictive means available.” *Hobby Lobby*, 723 F.3d at
5 1142–43. The government must show that the “compelling interest test is
6 satisfied through application of the challenged law ‘to the person’—the
7 particular claimant whose sincere exercise of religion is being substantially
8 burdened.” *Id.* at 1126 (quotations and citation omitted). “This burden-shifting
9 approach applies even at the preliminary injunction stage.” *Id.*

10 We have previously stated “a government act imposes a ‘substantial burden’
11 on religious exercise if it: (1) requires participation in an activity prohibited by
12 a sincerely held religious belief, (2) prevents participation in conduct
13 motivated by a sincerely held religious belief, or (3) places substantial
14 pressure on an adherent to engage in conduct contrary to a sincerely held
15 religious belief.” *Hobby Lobby*, 723 F.3d at 1125–26 (quotations and
16 alterations omitted); see also *Yellowbear*, 741 F.3d at 55 (applying this
17 framework to RLUIPA); *Abdulhaseeb*, 600 F.3d at 1315 (same). As we
18 discuss in the next section, whether a law substantially burdens religious
19 exercise in one or more of these ways is a matter for courts—not plaintiffs—to
20 decide.

21 4. Courts Determine Substantial Burden

22 To determine whether plaintiffs have made a prima facie RFRA claim, courts
23 do not question “whether the petitioner ... correctly perceived the commands
24 of [his or her] faith.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S.
25 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); see *Hobby Lobby*, 723 F.3d
26 at 1138–40. But courts do determine whether a challenged law or policy
27 substantially burdens plaintiffs’ religious exercise. RFRA’s statutory text and
28 religious liberty case law demonstrate that courts—not plaintiffs—must
determine if a law or policy substantially burdens religious exercise.

RFRA states the federal government “shall not substantially burden a person’s
exercise of religion.” 42 U.S.C. § 2000bb–1(a). We must “give effect ... to
every clause and word” of a statute when possible. *United States v. Menasche*,
348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955). Drafts of RFRA
prohibited the government from placing a “burden” on religious exercise.
Congress added the word “substantially” before passage to clarify that only
some burdens would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct.
26, 1993) (statements of Sen. Kennedy and Sen. Hatch).

We therefore consider not only whether a law or policy burdens religious
exercise, but whether that burden is substantial. If plaintiffs could assert and
establish that a burden is “substantial” without any possibility of judicial
scrutiny, the word “substantial” would become wholly devoid of independent
meaning. See *Menasche*, 348 U.S. at 538–39. Furthermore, accepting any
burden alleged by Plaintiffs as “substantial” would improperly conflate the
determination that a religious belief is sincerely held with the determination
that a law or policy substantially burdens religious exercise.

Id. at 1175– 1177 (fn. omitted).

To the extent that the FAA enforces a prohibition against collective activity, it not only

1 burdens but prohibits such collective activity, which is a core religious activity. Here, there is
2 clear tension: the right to help the fellow worker protected by the NLRA and the Norris
3 LaGuardia Act against the limitation imposed by the application of the FAA. The RFRA teaches
4 that the FAA must give way to the religious right to help fellow workers.

5 Nor is there any governmental interest. The NLRA and Norris-LaGuardia Act defeat the
6 argument that there is any governmental interest in forbidding or burdening group action. They
7 serve to protect such activity.

8 Finally the application of the FAA cannot comply with the RFRA by disallowing all
9 group actions, because it does not reflect a “least restrictive” means of accomplishing any
10 compelling governmental interest in preserving and protecting arbitration in general.

11 The least-restrictive-means standard is exceptionally demanding, see *City of*
12 *Boerne*, 521 U.S., at 532, 117 S.Ct. 2157, and it is not satisfied here. HHS has
13 not shown that it lacks other means of achieving its desired goal without
14 imposing a substantial burden on the exercise of religion by the objecting
15 parties in these cases. See §§ 2000bb–1(a), (b) (requiring the Government to
“demonstrat[e] that application of [a substantial] burden to the person ... is the
least restrictive means of furthering [a] compelling governmental interest”
(emphasis added)).

16 *Burwell v. Hobby Lobby Stores, Inc.*, *supra* at, 2780,

17 The FAA could be applied to contracts in all its aspects with this one exception of
18 application to concerted claims in arbitration by employees governed by the NLRA. Carving out
19 this exception, which is limited, would be the “least restrictive” means of achieving the goals of
20 the FAA without interfering with the religious rights of employees.⁵¹ Thus, the FAA would
21 apply in the *AT&T v. Concepcion*, 563 U.S. 321 (2011) context because no employee religious
22 rights were at issue. This would not affect any other policies that animate the FAA doctrines.

23 The question then is whether, when workers get together to benefit themselves in the
24 workplace, is this a religious exercise? That question is easily answered in the affirmative.

25 Religions are replete with references to the workplace. The religious exercise to help their
26 fellow worker is a fundamental tenet of every religion. Whether we use the phrase “brotherly

27 _____
28 ⁵¹ The FAA already carves out maritime transactions and contracts of employment for employees involved
in transportation.

love” or otherwise, every religion encourages workers to help each other to make themselves and the workplace better.⁵² The central religious act of helping other workers is a core principle of Christianity and all religions.

Hobby Lobby brought its lawsuit to challenge a portion of the Affordable Care Act because it claimed that statute burdened its religious exercise. The Court found, against the government’s arguments, that the Affordable Care imposed a substantial burden on religious activity and found that the government could not establish that it imposed the least restrictive means of establishing any governmental interest.

Here, we have three federal laws at issue:

- The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*;
- The Norris-LaGuardia Act, 29 U.S.C. § 11, *et seq.*; and
- The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

The RFRA supersedes any governmental restriction on the free exercise of such religious activity. To the extent that those laws are interpreted in any way to burden the religious exercise of helping fellow workers, the Religious Freedom Restoration Act requires that super strict scrutiny be applied.

Here, the National Labor Relations Act governs the right of employees to engage in concerted activities. It is nothing more than workers getting together to help themselves and their families. Thus, there is nothing inconsistent with the application of Section 7, but any limitation on the application of Section 7 would be contrary to the religious views of those who want to help fellow workers.⁵³

The Norris-LaGuardia Act is to the same effect.

Here, the employer will argue that the Federal Arbitration Act forecloses the application of the National Labor Relations Act and the Norris-LaGuardia Act. The problem, however, with

⁵² This is just a religious version of the solidarity principle explained by the Board in *Fresh and Easy, supra*. This is the application of the most fundamental religious principle: the Golden Rule. See https://en.wikipedia.org/wiki/Golden_Rule. If some fellow employees ask for help regarding a workplace issue, the other employee should help the first. The employer directly contradicts the Golden Rule.

⁵³ Respondent may argue the RFRA cannot apply. But that is contrary to its argument that the FAA applies. The Board must consider the impact of all relevant federal statutes.

1 the employer's argument is that the Religious Freedom Restoration Act must be interpreted and
2 applied in a way that protects the religious right of employees to engage in concerted activity. In
3 this case, the concerted activity would be to present group claims in order to benefit workers as a
4 group. This is nothing more than concerted activity.⁵⁴

5 There is no doubt that the Federal Arbitration Act, if applied to foreclose concerted
6 activity, would substantially burden the exercise of religion by those employees who wanted to
7 work together to help their brothers and sisters in the workplace. It would also burden those
8 employees of other employers. See, David B Schwartz, "The NLRA's Religious Exemption in a
9 Post Hobby Lobby World: Current Status, Future Difficulties, and A Proposed Solution," 30
10 A.B.A. J. Lab. & Emp. L. 227 (2015)(explaining that the RFRA does apply to the NLRA).

11 The burden shifts at that point under the RFRA for the government to establish that that
12 substantial burden "is in the furtherance of compelling government interest." Here, there is no
13 governmental interest.⁵⁵ The government can simply allow, consistent with the government
14 interest established by National Labor Relations Act and the Norris-LaGuardia Act, employees to
15 present their claims concertedly in some forum. Nothing in this case requires that that forum be
16 arbitration. That forum can be arbitration or in court. This is the central thrust of *Murphy Oil*.
17 What an employer cannot do, consistent with the National Labor Relations Act, the Norris-
18 LaGuardia Act and the Religious Freedom Restoration Act, is entirely foreclose workers working
19 together to make their workplace a better circumstance.

20 For these reasons, the Religious Freedom Restoration Act applies to this case.⁵⁶ The

21 ⁵⁴ These principles would not apply to most of the situations addressed by *AT&T v. Concepcion*, 563 U.S.
22 321 (2011), which involved commercial disputes.

23 ⁵⁵ It is clear that this is not "the least restrictive means of further compelling the governmental interest."

24 ⁵⁶ The religious exemption principles which we derive from the RFRA are already in place and have been
25 long recognized for those who have some religious objection to joining a supporting union. See 29 U.S.C.
26 § 159. There are some religions which have the basic tenet that adherents should not join or support
27 unions. Title 7 also recognizes that an accommodation is sometimes necessary. See *EEOC v. Univ. of*
28 *Detroit*, 904 F.2d 331 (6th Cir. 1990) (because employee's religious objection was to union itself,
reasonable accommodation was required allowing him to make charitable donation equivalent to amount
of union dues, instead of paying dues). Religious principles often govern and require an accommodation.
EEOC v. Abercrombie & Fitch Stores Inc., 135 S.Ct. 2028, 2015 WL 2464053 (2015). This case
represents this principle: there are those who believe that it is a basic religious tenet to help fellow
workers. Title VII thus requires an accommodation, workers who believe it is a religious exercise to help
their fellow workers must be accommodated.

1 Federal Arbitration Act cannot be applied to interfere with the religious right of employees to
2 help other employees by prohibiting employees from jointly working together to improve the
3 workplace and to help fellow workers with respect to wages, hours and working conditions.⁵⁷

4 **XXIII. THE REMEDY**

5 The ALJ did not address this issue.

6 The remedy should include the following.

7 The employer should be required to post permanently the Board's ill-fated employee
8 rights Notice. <https://www.nlr.gov/poster> The Courts that invalidated the rule requiring the
9 Notice posting indicated that such a Notice could be part of a remedy. The groups that opposed it
10 argued it could only be part of a remedy for specific unfair labor practices. It is time for the
11 Board to impose the requirement for a lengthy posting of that Notice as a remedy for unfair labor
12 practices.

13 Additionally, any notice that is posted should be posted for the period of time from when
14 the violation began until the notice is posted. The short period of 60 days only encourages
15 employers to delay proceedings, because the notice posting will be so short and so far in the
16 future.

17 The Notice should be included with any payroll statements. See California Labor Code
18 Section 226.

19 The Board's Notice and the Decision of the Board should be mailed to all employees.
20 Simply posting the notice without further explanation of what occurred in the proceedings is not
21 adequate notice for employees. The Board Decision should be mailed to former employees and
22 provided to current employees.

23 Notice reading should be required in this matter. That Notice reading should require that
24 a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and
25 the effect of the remedy. Simply reading a Notice without explanation is inadequate.
26 Behavioralists have noted that, "[t]aken by itself, face-to-face communication has a greater

27 _____
28 ⁵⁷ The Board must address the application of the RFRA because it contains a statutory fee requirement.
Charging Party is entitled to its fees if it prevails on this ground.

1 impact than any other single medium.” Research suggests that this opportunity for face-to-face,
2 two-way communication is vital to effective transmission of the intended message, as it “clarifies
3 ambiguities, and increases the probability that the sender and the receiver are connecting
4 appropriately.” Accordingly, a case study of over five hundred NLRB cases, commissioned by
5 the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending
6 “providing an opportunity on company time and property for a Board Agent to read the Board
7 Notice to all employees and to answer their questions...” The employer should not be present.
8 The Union should be notified and allowed to be present. This should be on work time and paid. If
9 the employees are working piece rate the rate of pay should be equal to their highest rate of pay to
10 avoid any disincentive to attend the reading.

11 The employer should not be allowed to implement a new FUAP. A new FUAP can only
12 occur after there has been a complete remedy of the violations found in this case. In other words,
13 the Employer may not implement any new policy until after it has completely remedied this case
14 by rescinding all the unlawful policies, posting an appropriate notice allowing employees to take
15 appropriate legal action without the implementation of any purported forced arbitration waiver.

16 The traditional notice is also inadequate. The standard Board notice should contain an
17 affirmative statement of the unlawful conduct. We suggest the following:

18 We have been found to have violated the National Labor Relations Act. We
19 illegally maintained a Mutual Arbitration Procedure. We have rescinded that
20 unlawful policy. We have agreed to toll the statute of limitation for any
claims which employees may have.

21 Absent some affirmative statement of the unlawful conduct, the employees will not
22 understand the arcane language of the notice. Nor is the notice sufficient without such an
23 admission. In effect, the way the notice is framed is the equivalent of a statement that the
24 employer will not do specified conduct, not an admission or recognition that it did anything
25 wrong to begin with.

26 The Notice should require that the person signing the notice have his or her name on the
27 notice. This avoids the common practice where someone scrawls a name to avoid being
28 identified with the notice, and the employees have no idea who signed it.

1 The employees should be allowed work time to read the Board's Decision and Notice. To
2 require that they read the Notice whether by email, on the wall or at home on their own time is to
3 punish them for their employer's misdeeds.

4 The employer should be required to toll the statute of limitations for any claims for the
5 period during which the FUAP has been in place until a reasonable time after employees receive
6 the notice so that they may assert any collective or group claims that they have. Otherwise, the
7 Employer would have had the advantage of forestalling and foreclosing group claims. This
8 would give employees an opportunity to learn that the FUAP has been rescinded and that they
9 may bring group or collective claims.

10 Interest should be awarded on any claims which are tolled.

11 The Notice should be read to employees by a Board agent outside the presence of
12 management. Representatives of the Charging Party should be present. Employees should be
13 allowed to ask questions.

14 **XXIV. THE MATTER SHOULD NOT HAVE BEEN SUBMITTED ON A**
15 **STIPULATED RECORD**

16 The Charging Party objected to the submission of this case on stipulated facts arguing that
17 there are additional facts which should be made part of the record. The Charging Party maintains
18 that this case was improperly submitted directly to the ALJ without granting a hearing so that the
19 Charging Party could produce those facts and make them part of the record. The Charging
20 Party's objection to the submission is incorporated by reference.

21 The Charging Party proposed as follows:

- 22 1. The Charging Party would propose to establish that acting concertedly or
23 collectively is an act of religious activity protected by the Religious Freedom Restoration Act.
24 The Administrative Law Judge has already issued an interim order on this issue and the Charging
25 Party makes this statement to protect the record.
- 26 2. The employer holds safety meetings where a notice could be read to the employees
27 or the employees could otherwise learn that the employer had modified the handbook and about
28 the unfair labor practice. Because this is a typical way of which employers communicate to

1 employees about issues affecting the workplace in the construction industry, any changes in the
2 handbook or the FUAP should be transmitted at such meetings.

3 3. The employer has disciplined employees for violating rules which appear in the
4 handbook. Employees would thus reasonably believe that if they did not use the Forced
5 Unilateral Arbitration Policy (FUAP) procedure to resolve employment disputes they could be
6 disciplined.

7 The ALJ erroneously refused to allow Charging Party to make an adequate record.

8 **XXV. CONCLUSION**

9 Respondent's FUAP is unlawful. The Board should find it is unlawful and order the
10 remedies sought in this case by the Charging Party. The Board should squarely face the
11 application under the Federal Arbitration Act. It may not be constitutionally applied to protect
12 the FUAP.

13 Dated: March 9, 2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

14
15 By: /s/ David A. Rosenfeld
DAVID A. ROSENFELD

16 Attorneys for Charging Party
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1 **CERTIFICATE OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed
3 in the County of Alameda, State of California, in the office of a member of the bar of this Court,
4 at whose direction the service was made. I am over the age of eighteen years and not a party to
5 the within action.

6 On March 9, 2016, I served the following documents in the manner described below:

7 **BRIEF OF CHARGING PARTY IN SUPPORT OF EXCEPTIONS**

- 8 ☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of
9 Weinberg, Roger & Rosenfeld for collection and processing of correspondence for
10 mailing with the United States Postal Service, and I caused such envelope(s) with
postage thereon fully prepaid to be placed in the United States Postal Service at
Alameda, California.
- 11 ☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of
12 Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be
transmitted by facsimile and I caused such document(s) on this date to be transmitted by
13 facsimile to the offices of addressee(s) at the numbers listed below.
- 14 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy
15 through Weinberg, Roger & Rosenfeld's electronic mail system from
json@unioncounsel.net to the email addresses set forth below.

16 On the following part(ies) in this action:

17 Warren L. Nelson
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22 I declare under penalty of perjury under the laws of the United States of America that the
23 foregoing is true and correct. Executed on March 9, 2016 at Alameda, California.

24
25 /s/ Joanna Son
Joanna Son

26 137192\854092
27
28